Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-17

ANN E. BIBLER, ADMX. OF THE ESTATE OF RALPH BIBLER, DECEASED, ET AL.,

Petitioners,

vs.

BERRY H. YOUNG, JR., ET AL.,

and

THE UNITED STATES OF AMERICA and THE FEDERAL AVIATION ADMINISTRATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The petitioner, Ann E. Bibler, Administratrix of the Estate of Ralph Bibler, deceased, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 27, 1974.

OPINION BELOW

The opinion of the Court of Appeals was reported in 492 F.2d 1351 (6th Cir. 1974), and appears in the separately printed appendix. The unreported opinion of the District Court for the Southern District of Ohio, appears in the separately printed appendix.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 27, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1)

QUESTIONS PRESENTED

1. Whether or not 14 C.F.R. Section 91.67, the Right of Way Rules, are applicable to aircraft operating within air traffic control areas, and if so, was respondent, Young, negligent in failing to observe the provisions thereof?

2. For purposes of 14 C.F.R. Section 91.87 regarding radio contact with control towers, is approach control an entity of the control tower as that term is construed in Section 14 Section 91.87?

3. Was the United States, through its agent, the Federal Aviation Administration, negligent in failing to warn the decedent, Bibler, of the presence of another aircraft in competing airspace?

4. Was the United States, through its agent, the Federal Aviation Administration negligent in failing to adhere to its procedural guide lines and advise decedent, Bibler, to contact local control at the outer marker?

5. Whether the proximate cause of the collision of the two aircraft approaching the same runway was the failure of approach control to observe the danger and warn the pilot?

STATUTORY PROVISIONS INVOLVED

(Printed in separately bound Appendix)

Code of Federal Regulations, Chapter 14:

> Section 91.67 Right of Way Rules; except water operations.
>
> Section 91.87 (a), (b) Operation at airports with operating control towers.

STATEMENT OF THE CASE

The jurisdiction of the Federal Court was invoked in the case as the action was brought under the Federal Tort Claims Act (18 U.S.C. Section 1346(b)). The action was brought by the petitioner, Ann Bibler, as Administratrix of her husband's estate against the United States and the Federal Aviation Administration for the wrongful death of her husband who was killed in a mid-air collision. Petitioner also sued respondent's Young and Ohio Aviation Distributors, Inc., the pilot and owner of the other plane.

In a related state case Sundin, the owner of the aircraft in which Bibler was killed, sued all the respondent's for property damage. By stipulation of all parties the cases were tried in the United States District Court for the Southern District of Ohio. Judge Rubin held that the petitioner's claims were barred by the contributory negligence of the deceased pilot.

In affirming the judgment of the District Court, the Court of Appeals held that the approach controller at the Port Columbus Airport was guilty of negligence for failing to tell the pilot Bibler to contact the local controller, but that this negligence was not the proximate cause of the collision. (App. p. 3). The Court of Appeals found that respondent, Young was not guilty of any negligence. The court also found Bibler contributorily negligent in that he failed to maintain contact with the control tower while in an airport traffic area. (App. pp. 14-15).

The mid-air collision occurred approximately two miles east of Port Columbus Airport, Columbus, Ohio on April 10, 1968. The petitioner's decedent, Bibler, was an instructor-pilot in aircraft 39J, and respondent, Young was piloting 18N. The respondent, United States and the Federal Aviation Administration operate the control tower at Port Columbus Airport. The control tower at Columbus Airport is divided into separate functions; Approach Control and Local Control are relevant to case at bar. Both aircraft were approaching Run-

way 28L at the airport, 18N for the purpose of landing and 39J was completing a second practice instrument approach and had informed Approach Control of his intention to conduct a third. Approximately one-fourth of the rear section of 39J was severed in the collision including the entire tail section. It immediately fell to the ground killing Bibler and a student pilot. 18N, with a portion of the tail section of 39J wrapped around its propeller made a safe emergency landing in a nearby field.

The reconstruction of the events preceding the collision are based entirely upon the tape recordings of all transmissions made to and by Approach and Local Control. A typed statement of these transmissions including time sequence is contained in pages 172 through 189 of the Appendix to the Appellants' Brief contained in the record transmitted to the Court. At 1457:50, 39J requests a second practice instrument approach after having successfully completed a first. Approach Control immediately acknowledged and then at 1502:26 Approach Control instructs 39J to turn to a heading of 260 degrees intercept the final approach course and clears him for a straight-in instrument approach to Runway 28L. At the same time 39J informs Approach Control he plans to execute a third missed approach and not to land. At 1503:23 Approach Control informs Local Control on the intercommunication line of 39J's presence on the localizer and informs Local Control to turn 39J south if he gets in the way. At 1503:47 Approach Control informs 39J he is one mile from the outer marker and that he will be spaced in reference to a Lake Central Nord aircraft approaching Runway 28L.

Between 1503:47 and 1504:24, 18N contacts Local Control and identifies himself as two miles south of the outer marker. During the same period Approach Control and Local Control are exchanging conversations on the intercommunication line regarding the location of the Approach Controller's wife. Shortly after 1504:24 Local Control advises 18N to plan to land on Runway 28L and that he is number two behind a Lake Central Nord. At 1504:34 Local Control informs Ap-

proach Control of the presence of 18N south of the outer marker. Next Local Control next informs 18N that he believes he has him in sight and clears him to land on Runway 28L. At 1507:45, 39J advises Approach Control that he is "just a beam off Western Electric." It is at this approximate point that 18N strikes 39J on the left rear side of 39J and at an angle of approximately 30 degrees.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE STANDARD OF CARE REQUIRED OF GOVERNMENT AIR TRAFFIC CONTROLLERS.

The exemptions of Federal Tort Claims Act were held not to preclude recovery against the government for the negligence of Air Traffic Control for landing two aircraft on the same runway in *Eastern Airlines* v. *Union Trust Company*, 221 F. 2d 62 (D.C. Cir. 1955), aff'd. sub nom., *United States* v. *Union Trust Company*, 350 U.S. 907 (1955). After this decision the duty of the air traffic controller has been expanded in scope commensurate with the requirements of air safety. The duty to warn is based on the simple principal that once the government has assumed a function or service, it is liable for negligent performance. *Indian Towing Company, Inc.* v. *United States*, 350 U.S. 61, 64-65, (1955). The lower standard of care imposed on the government by the Court below is in conflict with the standard imposed by other Circuits and merits review by this Court.

The Second Circuit in *Ingham* v. *United States*, 373 F. 2d 227 (2nd Cir. 1967), cert. denied, 389 U.S. 931 (1967), held that the controller had to do more than merely comply with operating procedures required by ATC manuals. The controller's twelve minute delay to advise the pilot of a change in weather was deemed negligence and a proximate cause of the crash of the airliner.

The same standard was imposed on ATC by the Ninth Circuit in *United States* v. *Furumizo*, 381 F. 2d 965 (9th Cir. 1967), wherein the pilot had been given the procedures manual warnings regarding wake turbulence, but proceeded to land as the controller watched. The Court found an "overriding duty" of safety that went beyond the requirements of the procedures manual and held there was a duty to repeat the warning when it was apparent to ATC that the pilot was in obvious danger.

In *Hartz* v. *United States*, 387 F. 2d 870 (5th Cir. 1968), the Fifth Circuit in deciding the duty of government air traffic controllers held that before a pilot can be held legally responsible for the movement of his aircraft he must know, or be held to have known, those facts which were then material to the safe operation of his aircraft. In *Hartz*, the controller's warning to the pilot to "watch the prop wash" was held to be insufficient warning of a wake turbulence. The controller was held to have a superior duty because of both the controller's better physical position for observation and his experience. The controller's negligence in failing to delay the take-off for a reasonable time was held to have been the proximate cause of the crash of a small plane on take-off into the turbulence from the prior take-off of a commercial airliner. Thus, establishing that pilot action could not be the proximate cause until he is charged with all the facts.

The duty of the air traffic controller was similarly decided by the Ninth Circuit in *Spaulding* v. *United States*, 455 F. 2d 222 (9th Cir. 1972). The controller is required to give all information and warnings specified in his manuals, and in certain situations he must give information beyond the manuals. *Spaulding*, *supra*, cited *Hartz*, *supra*, as an example of where the situation requires the controller to give additional warnings as the controller is better qualified to evaluate the actual situation.

The Fifth Circuit, again in *Gill* v. *United States*, 429 F. 2d 1072 (5th Cir. 1970) similarly held the duty of the United

States to exercise due care in providing services to airplane pilots rests either upon requirements of procedures manuals or upon general pilot reliance upon the government for the given service.

In *United Air Lines* v. *Weiner*, 335 F. 2d 379 (9th Cir. 1954), warnings beyond those prescribed in the manual were required when danger is known only to federal personnel. In *Weiner*, the controller failed to warn aircraft of the potential invasion of its airspace by a military jet.

Of the entities involved Approach Control alone possessed all the essential information necessary to avoid the crash. (App. p. 11). Thus the government of all the parties involved was better qualified to evaluate the situation and required by the standard set forth in *Hartz, supra*, to warn the aircraft of the danger. The Court of Appeals affirmed the District Courts' finding that the radar screen used by Approach Control was available to alert the controller of the decreasing separation between the two planes.

Under the standards set forth in *Hartz*, and the other cited cases, Bibler cannot be held legally responsible for the movement of his aircraft until he knows or can be held to have known, those facts which were material to the safe operation of his aircraft. Bibler did not know, nor was he capable of knowing where 18N was located. Approach Control possessed such knowledge. It was this negligence of Approach Control that proximately caused this collision, not any negligence on Bibler's part. Bibler's failure to contact Local Control can not be considered proximate cause when Approach Control has a duty to warn pilots of danger before the pilot is legally responsible.

The conflicting lesser degree of care required by the decision below is exemplified by the fact that Approach Control failed to even give the warnings required by procedures manuals. Under Section 674 of the Terminal Air Traffic Control Manual (App. D), the Approach Controller is required to issue certain instructions to the pilot regarding

switching to Local Control. This he failed to do. Approach Control did not even satisfy these requirements. Thus, the court below has set forth a standard far below those decided by other Courts of Appeals requiring the government to give warnings beyond those prescribed in the manuals.

These decisions because of conflicting nature of the duty prescribed for the air traffic controller involves questions of import beyond the parties involved in this case. If the decision below is allowed to stand the safety of operations at major airports will be jeopardized. The Sixth Circuit has imposed a standard of care on the government that is not commensurate with the task undertaken by the Federal Aviation Administration, namely the safety of air traffic in this county's airports. The decision of the court below and those of the Fifth, Second and Ninth Circuits need be reconciled to ensure a uniform standard.

2. THE INTERPRETATION OF 14 C.F.R. SECTION 91.87 ADOPTED BY THE COURT BELOW RAISES SIGNIFICANT PROBLEMS IMPORTANT TO THE SAFE OPERATION OF AIR TRAVEL.

The Federal Aviation Administration Regulations interpreted by the court below includes:

> *Communications with control towers operated by the United States.* No person may within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States unless two-way radio communications are maintained between that aircraft and the control tower. . . 14 C.F.R. Section 91.87(b) (1968).

The Court of Appeals affirmed the District Judge's finding that Bibler was guilty of contributory negligence consisting of failing to contact the Tower as he passed the outer marker

and failing to maintain radio cont. t with the Tower while in the airport traffic area. (App. p. 15). This finding of negligence was premised a "violation of the above regulation."

In affirming the finding of contributory negligence the court below discusses Bibler's failure to communicate with the "Tower." The District Court and the Court of Appeals are both confused by terms. The regulation quoted above prohibits flying within an airport traffic area unless two-way radio communications is maintained between the aircraft and the control tower. The term control tower is not limiting. In Appendix E is contained an excerpt from the FAA's Instrument Flying Handbook. It is important to note that the term "control tower" refers to five different subgroupings. The term control tower includes Local Control, Ground Control, Clearance Delivery, Departure Control and Approach Control. For some reason, both the District Court and the Court of Appeals concluded that the control tower, commonly referred to as Local Control, and Approach Control are two separate and distinct entities. This is not the case and was never intended by the regulation. Bibler was in contact with the "control tower" by maintaining two-way communications with Approach Control. Both the Sixth Circuit Court of Appeals and the District Court are wrong and have missed the point of the regulation when they hold otherwise.

In the opinion of the Court of Appeals at App. p. 2, the District Court's finding of fact concerning the functions of the control tower are set forth. The findings state:

> "The control of traffic in and around the Columbus Airport is a function of the Federal Aviation Administration. This facility operates from the Columbus *control tower.* There is a separation of function between Approach Control (APC) which monitors by radar traffic which is outside of a five mile radius from the tower, and Tower Control, also known as Local Control (TWR), which has jurisdiction over air traffic within the five mile radius." (Emphasis added).

The court correctly states the relationship among the terms control tower, Approach Control and Local Control. That is, that the term control tower includes the functions of Local Control and Approach Control. Yet in finding Bibler contributorily negligent, thus barring any recovery, both the District Court and the Court of Appeals concluded he had violated the regulation requiring contact with the control tower. The undisputed facts show Bibler maintained radio contact with Approach Control. Thus the finding of contributory negligence is based on the erroneous assumption that the term control tower does not encompass the Approach Control function.

The finding that Bibler violated 14 C.F.R. 91.87 by failing to maintain radio contact with the tower can only be based on the erroneous conclusion that the control tower does not include the Approach Controller. It is this erroneous construction of the Federal Air Regulations that this Court should review. Such construction will have a harsh effect on the operation of air traffic control facilities endangering the safety of all persons flying in and out of tower controlled airports in the United States.

This interpretation permits the government to, in effect, become two parties in this and other actions against the United States for negligent performance of control tower functions. On the facts of this case, as found by both the District Court and the Court of Appeals, Bibler was in radio contact with Approach Control at Port Columbus Airport, and concurrently respondent, Young, was communicating with Local Control. Both planes were being guided toward the same runway by two units of the same Air Traffic Control facility. A case of the right hand not knowing what the left is doing, certainly a violation of the high standard of care imposed on the government by the line of decisions in the Fifth, Ninth, and Second Circuits, supra.

The Federal Aviation Administration employees who con-

trol air traffic in our major airports are the agents of one party, the United States of America, which is responsible for their negligent performance that was proximate cause of this tragic accident. To exonerate the United States because two of its agents, who were in interphone contact with each other, directed two planes to approach the same runway at the same time is ludicrous.

In one case where this issue was present, a District Court held that one government air traffic controller cannot authorize an airplane to fly a collision course with another airplane then being monitored by another government controller and escape liability by claiming neither controller had a duty to separate them. *Cattarro* v. *Northwest Airlines, Inc.*, 236 F. Supp. 889 (D.C. Vir. 1964).

It is important that this Court determine the proper interpretation of 14 C.F.R. Section 91.87. The respective duties incumbent on pilot and controller must be determined. In order for this to be accomplished, the proper interpretation of the term control tower must be established. The procedures manuals, charts, and regulations that govern aviation are predicated on the Court's interpretation of the air traffic controller's duty of care. With nationwide aviation traffic, it is both impractical and dangerous for this standard to vary among the Circuits. Further, it is conceivable that following this decision one aircraft in contact with the one government controller might land on one runway, while a second aircraft, in contact with a second government controller, would land on the same runway at the same time with catastrophic results. To avoid such consequences petitioner respectfully submits that this Court should review this case and establish a standard of care for government air traffic control facilities commensurate with the responsibility for human life placed upon them.

3. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 14 C.F.R. SECTION 91.67.

In finding that Respondent, Young, was not guilty of any negligence, the Sixth Circuit held that he had not violated the right of way rules promulgated in the Federal Air Regulations:

> (e) OVERTAKING. Each aircraft that is being overtaken has the right of way and each pilot of an overtaking aircraft shall alter course to the right to pass will clear.
>
> (f) LANDING. Aircraft, while on final approach to land, or while landing, have the right of way over other aircraft in flight or operating on the surface. When two or more aircraft are approaching an airport for the purpose of landing, the aircraft at the lower altitude has the right of way, but it shall not take advantage of this rule to cut in front of another which is on final approach to land, or to overtake that aircraft. 14 C.F.R. Section 91.-67(e) & (f) (1973).

As stated by the Court below, Young's plane was both above and behind Bibler's. (App. 18). This under the language of Section 91.67(f) states Bibler had the right of way as he was at the lower altitude. However, the court found that Young could not see Bibler because of the configuration of his plane. (App. p. 18). This finding is based on the Court's opinion that Young was not required to take any further measures to observe Bibler or any other aircraft that might be in his path. This conclusion is in conflict with the duty imposed upon pilots by other Circuits interpreting the right of way rules.

The argument that the rules of right of way do not apply to Young is predicated on a note to 14 C.F.R. Section 60.14 reading in part:

> "Note: Right-of-way rules do not apply when, for reasons beyond the pilot's control, aircraft cannot be seen due to restrictions of visibility."

The Ninth Circuit in *United States* v. *Miller*, 303 F. 2d 703 (9th Cir. 1962), held that the configuration of the aircraft was not "beyond the pilot's control" and thus the note did not relieve the pilot of his duty to look out for other aircraft. This imposes a duty on the pilot to observe the right of way rules where by altering the plane's position the pilot can observe the area beneath and in front of his descending aircraft.

Thus the holding in *Miller* and that of the Court below imposes are directly in conflict as to the standard of care imposed on pilots by the Federal Air Regulations dealing with right of way, an area of aviation law whose effect on air safety is obvious. *Miller*, supra, involved two aircraft that collided while in an airport traffic area and under the control of government air traffic controllers. Thus the right of way rules were held applicable in the airport traffic area and the instant case is not distinguishable on that ground.

In *New York Airways, Inc.* v. *United States*, 283 F. 2d 496 (2d Cir. 1960), the Second Circuit found the pilot of a helicopter negligent in that he failed to manuever his aircraft to keep the touchdown area in sight. Thus imposing a duty to observe as in *United States* v. *Miller*, supra. Also in *George* v. *American Airlines, Inc.*, 295 F. 2d 311 (7th Cir. 1961), the crew of an air carrier were held negligent for failure to maintain a proper lookout. These cases all exhibit the imposition of a higher standard of care on pilots to observe other aircraft than does the decision of the Court below.

The Sixth Circuit states that the respondent, Young, was not in violation of the right-of-way rules as he had a clearance to land and the petitioner did not. The petitioner respectfully submits that this determination is an error. The fact that Bibler was not going to actually land does not alter the fact that he was cleared to approach runway 28L and should

have been observed by the respondent, Young. Further the Court below stated:

> "At the time and place concerned, Young did not know that what turned out to be Bibler's plane (39J) was even in the airport traffic area." (App. p. 18).

This statement is clearly an error. The flight transcript reveals that the local controller warned Young of Bibler's presence. When Young communicated to the Columbus tower that he was approaching the airport for a landing and was located south of the outer marker the Columbus local controller responded:

> "18N south of charlie mike plan runway 28L presently no. 2 following a nord on a right base leg for 28L and watch for traffic coming up on the marker, be making an aisle s (instrument) low approach."

The local controller had immediately prior to this point been told of the presence of 39J on the ILS approach.

The foregoing demonstrates that the conclusion of the Sixth Circuit Court of Appeals that Young had not violated the right-of-way rules was in error. This erroneous application of the rules should be reversed by this Court. More importantly, and even disregarding the Court's factual conclusions. The standard of care imposed on pilots by the Sixth Circuit Court of Appeals departs from that standard imposed by the Ninth Circuit in *United States* v. *Miller*, supra. The Sixth Circuit Court of Appeals has lowered the standard of care imposed on pilots at the expense of air safety. The conflict in interpretation of the Federal Air Regulations, and the differing standards imposed thereunder must be resolved by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX A.
REGULATIONS INVOLVED

14 C.F.R. § 91.67 Right-of-way Rules; Except Water Operations.

(a) GENERAL. Except when, because of restrictions to visibility beyond the pilot's control, another aircraft cannot be seen, each person operating an aircraft shall comply with this section. When a rule of this section gives another aircraft the right-of-way, he shall give way to that aircraft and may not pass over, under, or ahead of it, unless well clear.

(e) OVERTAKING. Each aircraft that is being overtaken has the right-of-way and each pilot of an overtaking aircraft shall alter course to the right to pass well clear.

(f) LANDING. Aircraft, while on final approach to land, or while landing have the right-of-way over other aircraft in flight or operating on the surface. When two or more aircraft are approaching an airport for the purpose of landing, the aircraft at the lower altitude has the right-of-way, but it shall not take advantage of this rule to cut in front of another which is on final approach to land, or to overtake that aircraft.

14 C.F.R. § 91.87 Operation at airports with operating control towers.

(a) GENERAL. Unless otherwise authorized or required by ATC, each person operating an aircraft to, from, or on an airport with an operating control tower shall comply with the applicable provisions of this section.

(b) COMMUNICATIONS WITH CONTROL TOWERS OPERATED BY THE UNITED STATES. No person may, within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States unless two-way radio communications are maintained between that aircraft and the control tower. However, if the aircraft radio fails in flight, he may operate that aircraft and land if weather conditions are at or above basic VFR weather minimums, he maintains visual contact with the tower, and he receives a clearance to land. If the aircraft radio fails while in flight under IFR, he must comply with Section 91.127.

APPENDIX B.

OPINION OF THE COURT OF APPEALS

Nos. 73-1201-02

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANN E. BIBLER, ADMX. OF THE ESTATE OF RALPH BIBLER, DECEASED, ET AL., *Plaintiffs-Appellants*,

v.

BERRY H. YOUNG, JR., ET AL., *Defendants-Appellees*.

UNITED STATES OF AMERICA, AND THE FEDERAL AVIATION ADMINISTRATION, *Third-Party Plaintiffs-Appellants*,

v.

BERRY H. YOUNG, JR., ET AL., *Third-Party Defendants-Appellees*.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed February 27, 1974.

Before: WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

EDWARDS, Circuit Judge. The widow of a deceased airplane pilot and instructor appeals from the judgment of the United States District Court for the Southern District of Ohio dismissing her complaint. The District Judge who tried this case without a jury found for the defendants on the ground of contributory negligence on the part of her husband who

was killed in an airplane crash. The suit was brought under the Federal Tort Claims Act (18 U.S.C. § 1346(b) (1970)), by Ann Bibler, as Administratrix of her husband's estate, on behalf of herself and their minor child against the United States and the Federal Aviation Administration, the operator of the control tower at the Columbus, Ohio, airport where the crash occurred. She also sued the owner and operator of the other aircraft which collided with Bibler's plane. The United States answered denying negligence and claimed indemnification against defendants Young and Ohio Aviation Distributors, Inc., the operator and the owner of the other plane.

By stipulation of the parties, another related state case was submitted to the court wherein Sundin, the owner of the plane in which Bibler was killed, sued all the same defendants for property damage occasioned by their claimed negligence. In turn Ohio Aviation counterclaimed for the damages to its plane.

The cases were heard before Judge Rubin in the United States District Court for the Southern District of Ohio. Judge Rubin held that the plaintiffs' claims were barred by the contributory negligence of the deceased pilot, Bibler, in that "He failed to advise the Local Control that he had passed the outer marker" in making a simulated landing at Port Columbus International Airport, and in that he failed to make and maintain radio contact with the Local Controller while over the airport area. The District Judge held that pilot Young was not guilty of negligence and awarded $17,000 damages to Ohio Aviation for the damage to the plane Young was flying. He also held that the approach controller at the Port Columbus Airport was guilty of negligence for failing to tell pilot Bibler to contact Local Control. But he held that this negligence was not the proximate cause of the accident. The District Judge also held that the Local Controller at the Port Columbus Airport was not guilty of negligence.

There were four parties involved in this air collision which

resulted in the death of two people. This record, as we view it, indicates that any one of the four might have prevented the crash. But actionable negligence does not consist of failing to take extraordinary measures which hindsight demonstrates would have been helpful. It consists of doing or failing to do what a reasonable man would do under the circumstances contronting him.

This appeal disputes the interpretation of the applicable rules and regulations and the inferences from the facts drawn by the District Judge. Many of the facts in this case were stipulated and none of them are currently in dispute.

We recite them from the District Judge's findings of fact:

"FINDINGS OF FACT

Finding of Fact (1)

General Conditions at Columbus International Airport

Columbus International Airport, known by pilots as CMH, is located in Franklin County, Ohio, immediately east of the City of Columbus. Its main runways lie in an east-west direction. Airport runways are identified by the first two digits of direction. Accordingly, the two main runways of Port Columbus are 28 left and 28 right, indicating an east to west bearing of approximately 280 degrees. When used west to east the same runways are known as 10 left and 10 right, signifying a heading of approximately 100 degrees. The precise magnetic bearing of 28 left and 28 right is 276 degrees.

Runway 28 left is 10,700 feet long and 150 feet wide. It is equipped for instrument landing and includes an electronic extension in the same compass heading referred to as a 'beam.' At a point 5.4 nautical miles (6.2 statute miles) east of runway 28's left threshold is the 'outer marker.' An outer marker is an electronic device that advises a pilot when he has passed over it on his way to a landing.

Between the outer marker and the runway threshold there is a middle marker which likewise electronically

advises the pilot that he has passed over such marker. A pilot may receive such information by a Beacon Marker Indicator which will cause a light to flash on the instrument panel and an audible radio signal to be given, or by a low frequency ADF receiver which will receive in Morse Code the identifying letters of the marker. The outer marker on runway 28 left is identified by the letters CM and is known by the term 'Charlie Mike.'

A plane need not contain such equipment in order to use part of the electronic extension of runway 28 left. A plane can be equipped merely to ascertain its position in relation to the electronic extension or 'localizer beam' and be guided onto the localizer for ultimate landing on the runway.

The control of traffic in and around the Columbus Airport is a function of the Federal Aviation Administration. This facility operates from the Columbus control tower. There is a separation of function between Approach Control (APC) which monitors by radar traffic which is outside of a five mile radius from the tower, and Tower Control, also known as Local Control (TWR),[1] which has jurisdiction over air traffic within the five mile radius. APC operations extend for approximately forty miles around Port Columbus. Local Control is housed at the top of the control tower. In 1968, when this accident occurred, Local Control did not have radar equipment and relied on visual sightings to identify and direct landing aircraft. The two control departments communicate with pilots on assigned frequencies: APC on 119.0 megahertz and TWR on 121.5. Because their jurisdictions are exclusive, pilots do not customarily communicate with both departments simultaneously.

When a pilot is flying under instrument flight regulations (IFR), he communicates with Approach Control until he reaches the outer marker. At this time he is

[1] The terms Local Control, Local Tower or Tower as used herein are synonymous and are all identified at TWR.

advised to contact Local Control in the tower on its frequency and report his presence. When a pilot is flying under visual flight regulations (VFR) he is not required to advise Approach Control of his presence, but contacts instead Local Control when he is in the vicinity of the outer marker.

Finding of Fact (2)

Cherokee N42 39J (39 Juliet)[2]

On April 10, 1968, Ralph D. Bibler, decedent, was a duly qualified and licensed commercial pilot and flight instructor with over 1000 hours of pilot flight time. He was in command of a Piper Cherokee aircraft, Registration No. N4239J. At approximately 3:00 p.m. on that date, he was instructing a student, one David Dunnick, in the procedures for instrument landing at Port Columbus. Mr. Dunnick had logged 123 hours of flight time. The plane was equipped with an omni-converter for localizer guidance. It was not equipped with an ADF radio Beacon Marker Indicator or any other electronic means of establishing position in relation to the outer marker. Prior to 3:00 p.m., 39 Juliet was operating under Instrument Flight Regulations (IFR) procedures with student Dunnick at the controls. Dunnick was wearing a 'hood,' a vision limiting device which focused his attention upon the instrument panel. As the operating pilot student Dunnick occupied the left hand seat. Instructor Bibler occupied the right hand seat. Weather conditions at Port Columbus on April 10, 1968, were such that visual flight regulations (VFR) were in effect. Proceeding under IFR conditions in a VFR day placed an obligation upon Bibler to act as 'safety pilot' and observe the classical admonition under VFR conditions of 'see and be seen.'

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[2] There is an identification system used by pilots and controllers which involves the last two digits and letter of a plane's registration. Specific words are used to avoid letter confusion. Thus Cherokee N4239J was known as "39 Juliet" and Bonanza N8318N was referred to as "18 November."

Finding of Fact (3)

Bonanza N8318N (18 November)

Defendant Berry D. Young, a retired United States Air Force Lieutenant Colonel, on April 10 was piloting Beechcraft Bonanza No. 8318N. Defendant Young at the time had logged in excess of 7,000 hours of pilot flying time. He was employed as a salesman by defendant Ohio Aviation Company, a distributor of Beechcraft products. The instrument equipment of 18 November is not significant since Young was flying, on the date in question, under VFR conditions. One such instrument, the air speed indicator, was known to be inaccurate in its operation. Mr. Young had taken off at approximately 14:30 (2:30 p.m.) from the Wood County Airport at Parkersburg, West Virginia. At 1500 (3:00 p.m.) he was proceeding in a westerly direction parallel to Interstate 70 and immediately south thereof. His direction would approximate the magnetic heading of runway 28 and he would be approximately 2 miles south of an eastward projection thereof. He first contacted Local Control at 1504 (3:04 p.m.) locating himself "2 miles south of Charlie Mike" (outer marker).

Finding of Fact (4)

Approach Control (APC)

Approach Control at the Port Columbus tower was made aware of the presence of 39 Juliet at 1440:54 (2:40 p.m.). Its pilot requested a practice instrument approach at the Port Columbus Airport. In answer to its question Approach Control was advised that 39 Juliet was rated and equipped for an ILS approach. It is a matter of definition whether it was so equipped. 39 Juliet could electronically locate the localizer beam; it could not electronically find either the outer marker or the middle marker. The outer marker at Port Columbus can be visually determined and on the first ILS approach, Local Control was advised when 39 Juliet passed the marker.

This was in accordance with previous instruction from Approach Control. An ILS practice approach is treated as a missed approach. 39 Juliet was instructed to execute a right turn to heading 50°, ascend to an altitude of 2,700 feet and return to the frequency of Approach Control. At 1457:50, 39 Juliet did so return and was guided or 'vectored' in a clockwise direction for a second approach to the runway. Thereafter Approach Control gave 39 Juliet the following instructions: 1500:16 heading 100°; 1501.25 heading 180°; 1502:26 heading 260°.

At 1503:47, 39 Juliet was noted by Approach Control as 'on the localizer a mile from the marker.' At no time did Approach Control have radio contact with 18 November. APC was, however, aware that 18 November would land on runway 28 left.

Finding of Fact (5)

Local Control (TWR)

Local Control did not have in 1968 a radar scope that would assist its controllers (or Tower Control) in locating and monitoring a specific plane. The tower controllers were required to make visual locations assisted by binoculars when those were indicated. TWR had contact with 39 Juliet on the first approach from 1449, when it was advised that 39 Juliet had passed the outer marker, until 1457:50, when the pilot returned to the frequency of Approach Control. At 1503:23 TWR was advised that 39 Juliet was on the localizer. Approach Control advised that if 39 Juliet got in TWR's way he was to be turned south.

Approximately 37 seconds later at 1504, 18 November advised TWR that he was 2 miles south of Charlie Mike for landing. TWR instructed 18 November to land on runway 28 left number two following a flight of Lake Central Airlines in a Nord aircraft. This transmission included notice of traffic coming upon the outer marker intending an ILS low approach. The term 'low approach'

or 'low go' refers to a landing approach that will not be completed.

At no time after 1457:50 was there radio communication between 39 Juliet and Local Control although no later than 1504:47, 39 Juliet did in fact cross the outer marker. 39 Juliet never contacted TWR during the time it was inside the outer marker. Its last advice at 1507:45 was made to Approach Control and its radio in the wreckage was found to be tuned to 119.0 mg. Approach Control frequency (Ex. 45 at 8).

Finding of Fact (6)

Time and Location

In midair collision cases, the relative positions of the aircraft are of sufficient importance to be considered in detail. The Court finds that the positions of the two aircraft over the crucial period of time prior to their crash, were as follows:

POSITION

	39J	18N
Prior to 1500		
1459:07	North East of Tower 2 mi. heading 50°	Unknown – heading westerly from Parkersburg, W. Va.
1500-1501		
1500:16	Heading 100°	Unknown – heading westerly from Parkersburg, W. Va.
1501-1502		
1501:25	Heading 180°	Unknown – heading westerly from Parkersburg, W. Va.
1502-1503		
1502:26	Heading 260°	Unknown – heading westerly from Parkersburg, W. Va.

1503-1504		
1503:23	On the localizer	Unknown – heading westerly from Parkersburg, W. Va.
1503:47	On the localizer a mile from the marker	Unknown – heading westerly from Parkersburg, W. Va.
1504-1505		
1504:14½	On the localizer	2 mi. s. of Charlie Mike
1504:44½	On the localizer	down by Pandora's Box
1505-1506		
1505:34*	On the localizer	South of the approach course
1506-1507		
1506:41	On the localizer	In sight [of Tower]
1507-1508		
1507:45	A beam Western Electric	

Finding of Fact (7)

Knowledge of Parties

(A) Knowledge of 18 November – After contacting Local Control at 1504, Young was advised to plan to land on runway 28 left following the Lake Central Nord and to watch traffic coming up on the outer marker making an ILS low approach. The term, 'coming up on the outer marker,' indicates a position of such traffic at that time east of the outer marker. Because only 13 seconds had elapsed from the location of 39 Juliet at one mile from the outer marker, this statement was correct. At 1505:47* he was advised of the Lake Central Nord about a mile out of the airport and cleared to land on runway 28 left.

(B) Knowledge of 39 Juliet – Following the vectoring that had ended at 1502:26, 39 Juliet had received from Approach Control a clearance for a straight in ILS 28L

approach. At 1503:47 he was advised that he was on the localizer one mile from the outer marker and spaced in reference to a Lake Central Nord three miles north of the airport. The term 'spaced in reference to Lake Central Nord' is not a clearance to land nor is it a landing sequence. At 1507:45, 39 Juliet knew he was inside the outer marker since he advised Approach Control 'a beam of Western Electric.' No conversation at any time in this approach was had with Local Control.

(C) Knowledge of Approach Control – At 1502:26 Approach Control knew that 39 Juliet was heading 260° intending another missed approach. At 1503:47 he knew that 39 Juliet was on the localizer one mile from the outer marker. At 1504:34 Approach Control knew that 18 November was intending to land on 28 left. At 1504:44½ Approach Control knew that 18 November was in the vicinity of Pandora's Box heading for the approach to 28 left. At no time did Approach Control speak to 18 November. Alone of the four parties involved, Approach Control possessed all of the critical information. Two planes no more than three miles apart were planning to use the same runway approach and were converging thereon. The radar scope that had previously located 39 Juliet 'one mile from the outer marker' and 18 November 'down by Pandora's Box' was available to alert Approach Control of the decreasing separation between the two planes.

(D) The knowledge of Local Control – At 1503:23 he knew that 39 Juliet was on the localizer. At 1504 he knew that 18 November was 2 miles south of the outer marker. At 1505:44° he knew that 18 November was south of the approach and could see the Lake Central Nord. At 1505.51° he was advised that 18 November would land a little long. At 1506:41 he had 18 November in sight and cleared him to land on runway 28 left. He had no precise knowledge of the location of 39 Juliet. Neither the communication of 1503:47 identifying 39 Juliet one mile from the outer marker nor the communication of 1507:45 identifying 39 Juliet 'just a beam of West-

> ern Electric' was received by the Tower since these communications were on Approach Control frequency. Bearing on local control's lack of knowledge concerning the location of 39 Juliet is the fact that as late as 1507:44 he inquired whether that plane was within the outer marker." (Footnotes 3, 4 and 5 omitted.)

The law applicable to this Federal Tort Claims Act action is, of course, that of the State of Ohio, where the accident occurred. *Richards* v. *United States*, 369 U.S. 1 (1962). Ohio law makes no provision for a comparative negligence, and as the District Judge held, it bars recovery to any plaintiff whose negligence contributed as a proximate cause to the happening of the accident.[1] *Bahm* v. *Pittsburgh & Lake Erie Rd. Co.*, 6 Ohio St. 2d 19 (1966); *Drown* v. *Ohio Traction Co.*, 76 Ohio St. 234 (1907).

As we have indicated, the District Judge held that Bibler's contributory negligence consisted of failing to contact the Tower as he passed the outer marker and failing to maintain radio contact with the Tower while in the airport traffic area.

It is appellant's contention, however, that since Bibler was in contact with Approach Control, he was in contact with the Tower and that he was under no legal duty to report his passing of the outer marker.

We believe that several Federal Aviation Administration Regulations are applicable:

> (1) The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft. 14 C.F.R. § 91.3 (1973).
>
> (2) *Communications with control towers operated by the United States.* No person may, within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States

[1] Plaintiff is suing as Administratrix of the estate of her deceased husband, and hence, his contributory negligence would bar her claim.

unless two-way radio communications are maintained between that aircraft and the control tower. However, if the aircraft radio fails in flight, he may operate that aircraft and land if weather conditions are at or above basic VFR weather minimums, he maintains visual contact with the tower, and he receives a clearance to land. If the aircraft radio fails while in flight under IFR, he must comply with § 91.127. 14 C.F.R. § 91.87(b) (1973).

(3) The pilot in command of each aircraft operated under IFR in controlled airspace shall have a continuous watch maintained on the appropriate frequency and shall report by radio as soon as possible—

(a) The time and attitude of passing each designated reporting point, or the reporting points specified by ATC, except that while the aircraft is under radar control, only the passing of those reporting points specifically requested by ATC need be reported;

(b) Any unforecast weather conditions encountered; and

(c) Any other information relating to the safety of flight. 14 C.F.R. § 91.125 (1973).

(4)(e) *Overtaking.* Each aircraft that is being overtaken has the right of way and each pilot of an overtaking aircraft shall alter course to the right to pass well clear.

(f) *Landing.* Aircraft, while on final approach to land, or while landing, have the right of way over other aircraft in flight or operating on the surface. When two or more aircraft are approaching an airport for the purpose of landing, the aircraft at the lower altitude has the right of way, but it shall not take advantage of this rule to cut in front of another which is on final approach to land, or to overtake that aircraft. 14 C.F.R. § 91.67(e) & (f) (1973).

Likewise applicable to our problems on this appeal is a sentence from the Airman's Information Manual:

"During the time an IFR flight is operating in VFR weather conditions, it is the direct responsibility of the

pilot to avoid other aircraft, since VFR flights may be operating in the same area without knowledge of ATC (air traffic control)." *Airman's Information Manual* (AIM, 1-58).

Of similar applicability is a Port Columbus regulation which places on the Approach Controller the specific duty of telling the pilot of an airplane which he has cleared for an approach to contact Tower Control when he reaches the final approach fix. TERMINAL AIR TRAFFIC CONTROL MANUAL, Rule 674(d).

With these facts and these rules and regulations in mind, we conclude that the District Judge's finding of contributory negligence on the part of pilot Bibler must be affirmed and therefore the two original causes of action were properly dismissed.

Under Rule 52(a) of the Federal Rules of Civil Procedure, this court cannot set aside the findings of fact of the District Judge unless we can say that they are "clearly erroneous." Judge Rubin's findings are not only not "clearly erroneous"; we believe they are support by the great weight of the evidence in this record. Indeed, as pointed out above, aside from interpretations of the regulations and inferences from the facts, they are undisputed.

We now turn directly to Judge Rubin's conclusions pertaining to pilot Bibler's contributory negligence. Like the District Judge, we believe that 14 C.F.R. § 91.87(b) (1973), specifically forbids operating any aircraft within an airport traffic area (described at the time as within five miles of the Tower and below 2,000 feet) which airport has a control tower operated by the United States "unless two-way radio communications are maintained between that aircraft and the control tower." Like the District Judge, we reject the appellant's contention that Bibler satisfied this rule by maintaining two-way radio contact with the Approach Controller. This record which contains much expert testimony, demonstrates conclusively that when the term "Control Tower" or "Tower" is used in

connection with operations "within an airport traffic area," the terms refer to local control and not to approach control. This conclusion is strengthened by the fact that under visual flight conditions, such as prevailed on the date of this accident, Approach Control would not routinely have radio contact with in-bound traffic. Like Young's plane (18N), such traffic would ordinarily report only to the Tower (local control) at the outer marker. Thus Approach Control would be powerless to talk to or guide away from danger most of the planes within the airport traffic area.

Since the State of Ohio has adopted Federal Air Regulations as its own (*See* Ohio Rev. Code, §§ 4561.05, 4561.14), we believe that Bibler's violation of 14 C.F.R. § 91.87(b) was also a violation of Ohio law, and negligence per se. *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 349 (1920); *Eastern Airlines* v. *Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), *aff'd sub nom. United States* v. *Union Trust Co.*, 350 U.S. 907 (1955).

We also affirm the District Judge's conclusion that pilot Bibler was guilty of contributory negligence in failing to "advise local control that he had passed the outer marker."

Strangely, the federal regulations on this score (*See* § 91.125 previously quoted) are not sufficiently definite to support this conclusion as a matter of law. But this record shows that the weight of the expert evidence does support the District Judge's statement in this regard. The testimony of expert witness Culley is persuasive:

> Q. And as a pilot, when an aircraft is making an actual or simulated ILS approach, is there anything the pilot must do in passing over the outer marker as required by good operating procedures?
>
> A. Yes, he should most definitely report the final approach fix or the outer marker in this case to the local controller or to approach control.
>
> THE COURT: Mr. Pangia, excuse me just a moment. May I ask you a question in this regard: You said he should.

THE WITNESS: Yes, sir.

THE COURT: Now, does that mean he must or is it just good practice to do so?

THE WITNESS: It is not required by Federal Air Regulations that he do so, but it is a part of the recommended air traffic control procedures on which all instrument flying is predicated.

THE COURT: Okay. His failure to do so does not subject him to any discipline? Aside from the question of negligence, I don't want to get into that, but his failure to do as you stated is not a violation of any of the FAA regulations?

THE WITNESS: No, sir, it is not.

THE COURT: Thank you. You may proceed.

Q. (By Mr. Pangia) Is it fair to say, Mr. Culley, that there are many things which pilots should do in the operation of the aircraft that are not spelled out exactly in the Federal Aviation Regulations?

A. Absolutely.

Q. Mr. Cully, if an aircraft was making an ILS approach, practice or otherwise, and he was not told to change from approach to the tower frequency, what, if anything should the pilot do?

A. As a pilot, if he has not been told to report or instructed to report as he approaches the marker, he should query approach control as to whether or not he wants him to change frequency to local control. If in the event we have a frequency congestion and he can't get to him or can't get a reply, he automatically changes to local control, the reason being, if I may say, as a pilot, I am interested in the traffic ahead of me. If I continue to monitor approach control frequency, I am only getting traffic that is behind me and to the side of me. If I am on the tower frequency, I can hear other traffic and communication with the tower, and I can determine their position from that report.

Q. And if an aircraft were not making a radar approach, Mr. Culley, would he get his landing sequence and clearance to land from the local controller?

A. Landing sequence and clearance to land is assigned by the approach controller under these conditions.

Q. I am sorry.

A. I beg your pardon, under tower control.

Q. Is it done by the approach controller in that condition?

A. No, sir, it is not.

While we recognize that Culley's testimony might be affected by his employment with defendant, Federal Aviation Administration, other witnesses, including plaintiff Sundin (owner of the plane Bibler was flying) furnish confirmation of the essential points of this testimony.

Finally, the Airman's Manual contains this paragraph:

Report Leaving Final Approach Fix

Pilots conducting a prescribed instrument approach are reminded of the importance of reporting to ATC or an FSS when over the final approach fix on final approach. ATC may predicate separation between departures and arrivals and between successive arrivals on the basis of this report; therefore, failure to make this report may compromise separation criteria. *Airman's Information Manual*

This instruction is vividly underlined by the comment of the Local Controller immediately after the mid-air collision on April 10, 1968:

"He [Bibler (39J)] never called me at the marker."

Since pilot Bibler's failure to report at the Marker or to contact Local Control deprived Local Control of knowledge that Bibler's plane (39J) had passed the marker and was in proximity of Young's plane (18N), it served to prevent action by Local Control to warn and separate the converging planes. It also served to deprive Bibler of knowledge of Young's clearance to land and Young of Bibler's presence within the airport traffic area. Clearly the negligence we have described

on Bibler's part was a proximate cause of the accident. Such contributory negligence under the Ohio cases cited earlier bars recovery by either plaintiff Administratrix or plaintiff Sundin in the original actions, regardless of whether or not the negligence of the Approach Controller (in failing to tell Bibler to switch to Local Control) contributed as a proximate cause also.

There remains for our consideration only appellant's vehement protest against recovery by Ohio Aviation of the $17,000 worth of damages suffered by the Bonanza 18N piloted by appellee Young. Here appellant relies upon a regulation which places the burden of yielding the right of way upon an overtaking plane (*See* 14 C.F.R. § 91.67) *i.e.* upon Young. Since visual flight conditions prevailed at the time and place concerned, the fact that neither pilot ever saw the other is apparently explained by the fact that Young's plane (18N) was both above and behind Bibler's, and hence, as found by the District Judge, Young could not see Bibler and Bibler could not see Young because of the configuration of their planes.

At the time and place concerned Young had a clearance to land and was proceeding according to it. Bibler did not have a clearance to land; he had only a clearance to approach. Thus, under 14 C.F.R. § 91.67(f), Young had the right of way over Bibler. At the time and place concerned Young did not know that what turned out to be Bibler's plane (39J) was even in the airport traffic area. Expert testimony supports the District Judge's conclusion that Young's failure to take extraordinary measures to observe below him by side slipping and veering off his course (while landing) was not negligence – even though by hindsight such action might well have prevented the accident.

For these reasons and others spelled out in the District Judge's Findings of Fact Opinion and Conclusions of Law, the judgments of the District Court are affirmed.

APPENDIX C.

OPINION OF THE DISTRICT COURT

IN THE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL NO. 70-56
CIVIL NO. 70-82

ANN E. BIBLER, admx. of the estate of Ralph D. Bibler, deceased, etc.,

PLAINTIFF,

vs.

BERRY H. YOUNG, JR., et al.,

DEFENDANTS.

DONALD L. SUNDIN,
dba SUNDIN AVIATION COMPANY,

PLAINTIFF,

vs.

UNITED STATES OF AMERICA and
FEDERAL AVIATION ADMINISTRATION,

DEFENDANTS.

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

(Filed October 6, 1971)

I

INTRODUCTION

In dealing with a midair collision and the circumstances which culminate in such a tragedy, a court, of necessity, enters a complex and somewhat alien world. It is a world inhabited by uniquely trained people, speaking a strange but precise jargon and utilizing highly sophisticated machines. It is an inter-dependent and self-contained world in which the pilots and air controllers must share information with one another and where failure to do so may bring swift disaster. The knowledge necessary to avoid catastrophe may initially be within the peculiar knowledge of only one of the several participants, for there are major contrasts between the almost unlimited physical vision of a pilot in a cockpit and the circumscribed visual limitations of a controller in a darkened radar room. But conversely a pilot exists in an environment where at times weather conditions, physical surroundings and speed of his aircraft make him dependent upon the greater electronic vision of the controller's radar scope.

Perhaps most importantly, we are dealing with a world where the failure to share essential information results, often enough, in all to apparent disasters. One such accident occurred on April 10, 1968, at Port Columbus Airport, Columbus, Ohio. This accident forms the subject matter of the present law suit as to which the Court makes the following findings of fact.

II

FINDINGS OF FACT

Finding of Fact (1)

General Conditions at Columbus International Airport

Columbus International Airport, known by pilots as CMH, is located in Franklin County, Ohio immediately east of

the City of Columbus. Its main runways lie in an east-west direction. Airport runways are identified by the first two digits of direction. Accordingly, the two main runways of Port Columbus are 28 left and 28 right, indicating an east to west bearing of approximately 280 degrees. When used west to east the same runways are known as 10 left and 10 right, signifying a heading of approximately 100 degrees. The precise magnetic bearing of 28 left and 28 right is 276 degrees.

Runway 28 left is 10,700 feet long and 150 feet wide. It is equipped for instrument landing and includes an electronic extension in the same compass heading referred to as a "beam." At a point 5.4 nautical miles (6.2 statute miles) east of runway 28's left threshold is the "outer marker." An outer marker is an electronic device that advises a pilot when he has passed over it on his way to a landing.

Between the outer marker and the runway threshold there is a middle marker which likewise electronically advises the pilot that he has passed over such marker. A pilot may receive such information by a Beacon Marker Indicator which will cause a light to flash on the instrument panel and an audible radio signal to be given, or by a low frequency ADF receiver which will receive in Morse Code the identifying letters of the marker. The outer marker on runway 28 left is identified by the letters CM and is known by the term "Charlie Mike."

A plane need not contain such equipment in order to use part of the electronic extension of runway 28 left. A plane can be equipped merely to ascertain its position in relation to the electronic extension or "localizer beam" and be guided onto the localizer for ultimate landing on the runway.

The control of traffic in and around the Columbus Airport is a function of the Federal Aviation Administration. This facility operates from the Columbus control tower. There is a separation of function between Approach Control (APC) which monitors by radar traffic which is outside of a five mile radius from the tower, and Tower Control.

also known as Local Control (TWR),[1] which has jurisdiction over air traffic within the five mile radius. APC operations extend for approximately forty miles around Port Columbus. Local Control is housed at the top of the control tower. In 1968, when this accident occurred, Local Control did not have radar equipment and relied on visual sightings to identify and direct landing aircraft. The two control departments communicate with pilots on assigned frequencies: APC on 119.0 megahertz and TWR on 121.5. Because their jurisdictions are exclusive, pilots do not customarily communicate with both departments simultaneously.

When a pilot is flying under instrument flight regulations (IFR), he communicates with Approach Control until he reaches the outer marker. At this time he is advised to contact Local Control in the tower on its frequency and report his presence. When a pilot is flying under visual flight regulations (VFR) he is not required to advise Approach Control of his presence, but contacts instead Local Control when he is in the vicinity of the outer marker.

Finding of Fact (2)

Cherokee N42 39J (39 Juliet)[2]

On April 10, 1968, Ralph D. Bibler, decedent, was a duly qualified and licensed commercial pilot and flight instructor with over 1000 hours of pilot flight time. He was in command of a Piper Cherokee aircraft, Registration No. N4239J. At approximately 3:00 p.m. on that date, he was instructing a student, one David Dunnick, in the procedures for instrument landing at Port Columbus. Mr. Dunnick had logged 123 hours of flight time. The plane was equipped with an

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[2] There is an identification system used by pilots and controllers which involves the last two digits and letter of a plane's registration. Specific words are used to avoid letter confusion. Thus Cherokee N4239J was known as "39 Juliet" and Bonanza N8318N was referred to as "18 November."

omni-converter for localizer guidance. It was not equipped with an ADF radio Beacon Marker Indicator or any other electronic means of establishing position in relation to the outer marker. Prior to 3:00 p.m., 39 Juliet was operating under Instrument Flight Regulations (IFR) procedures with student Dunnick at the controls. Dunnick was wearing a "hood," a vision limiting device which focused his attention upon the instrument panel. As the operating pilot student Dunnick occupied the left hand seat. Instructor Bibler occupied the right hand seat. Weather conditions at Port Columbus on April 10, 1968, were such that visual flight regulations (VFR) were in effect. Proceeding under IFR conditions in a VFR day placed an obligation upon Bibler to act as "safety pilot" and observe the classical admonition under VFR conditions of "see and be seen."

Finding of Fact (3)

Bonanza N8318N (18 November)

Defendant Berry D. Young, a retired United States Air Force Lieutenant Colonel, on April 10 was piloting Beechcraft Bonanza No. 8318N. Defendant Young at the time had logged in excess of 7,000 hours of pilot flight time. He was employed as a salesman by defendant Ohio Aviation Company, a distributor of Beechcraft products. The instrument equipment of 18 November is not significant since Young was flying, on the date in question, under VFR conditions. One such instrument, the air speed indicator, was known to be inaccurate in its operation. Mr. Young had taken off at approximately 14:30 (2:30 p.m.) from the Wood County Airport at Parkersburg, West Virginia. At 1500 (3:00 p.m.) he was proceeding in a westerly direction parallel to Interstate 70 and immediately south thereof. His direction would approximate the magnetic heading of runway 28 and he would be approximately 2 miles south of an eastward projection thereof. He first contacted Local Control at 1504 (3:04 p.m.) locating himself "2 miles south of Charlie Mike" (outer marker).

Finding of Fact (4)

Approach Control (APC)

Approach Control at the Port Columbus tower was made aware of the presence of 39 Juliet at 1440:54 (2:40 p.m.). Its pilot requested a practice instrument approach at the Port Columbus Airport. In answer to its question Approach Control was advised that 39 Juliet was rated and equipped for an ILS approach. It is a matter of definition whether it was so equipped. 39 Juliet could electronically locate the localizer beam; it could not electronically find either the outer marker or the middle marker. The outer marker at Port Columbus can be visually determined and on the first ILS approach, Local Control was advised when 39 Juliet passed the marker. This was in accordance with previous instruction from Approach Control. An ILS practice approach is treated as a missed approach. 39 Juliet was instructed to execute a right turn to heading 50°, ascend to an altitude of 2,700 feet and return to the frequency of Approach Control. At 1457:50, 39 Juliet did so return and was guided or "vectored" in a clockwise direction for a second approach to the runway. Thereafter Approach Control gave 39 Juliet the following instructions: 1500:16 heading 100°; 1501:25 heading 180°; 1502:26 heading 260°.

At 1503:47, 39 Juliet was noted by Approach Control as "on the localizer a mile from the marker." At no time did Approach Control have radio contact with 18 November. APC was, however, aware that 18 November would land on runway 28 left.[3]

---

[3] The following dialogue appears in Exhibit 45:

TWR to APC	The guy south of the Marker just talking to me he'll be coming in for the left one.
APC to TWR	I'm not talk, ah (unintelligible) I don't see anybody.
I/C	
TWR to APC	Oh he said he's just south of Charlie Mike.
TWR	One eight November you did say you're just south of Charlie Mike (unintelligible).

Finding of Fact (5)

Local Control (TWR)

Local Control did not have in 1968 a radar scope that would assist its controllers (or Tower Control) in locating and monitoring a specific plane. The tower controllers were required to make visual locations assisted by binoculars when those were indicated. TWR had contact with 39 Juliet on the first approach from 1449, when it was advised that 39 Juliet had passed the outer marker, until 1457:50, when the pilot returned to the frequency of Approach Control. At 1503:23 TWR was advised that 39 Juliet was on the localizer. Approach Control advised that if 39 Juliet got in TWR's way he was to be turned south.

Approximately 37 seconds later at 1504, 18 November advised TWR that he was 2 miles south of Charlie Mike for landing. TWR instructed 18 November to land on runway 28 left number two following a flight of Lake Central Airlines in a Nord aircraft. This transmission included notice of traffic coming upon the outer marker intending an ILS low approach. The term "low approach" or "low go" refers to a landing approach that will not be completed.

At no time after 1457:50 was there radio communication between 39 Juliet and Local Control although no later than 1504:47, 39 Juliet did in fact cross the outer marker. 39 Juliet never contacted TWR during the time it was inside the outer marker. Its last advice at 1507:45 was made to Approach Control and its radio in the wreckage was found to be tuned to 119.0 mg. Approach Control frequency. (Ex. 45 at 8).[4]

I/C
APC to TWR Yes he's down by Pandora's Box.
18N Ah eastbound.
I/C
APC to TWR Help you any?
I/C
TWR to APC Yea.

[4] The speed of 39 Juliet cannot be precisely determined, but it can be approximated. The airplane had traveled from one mile east of the outer marker at 1503:47 to "just a beam of Western Electric" at 1507:45. This distance approximately 4.4 miles. The accident

Finding of Fact (6)

Time and Location

In midair collision cases, the relative positions of the aircraft are of sufficient importance to be considered in detail. The Court finds that the positions of the two aircraft over the crucial period of time prior to their crash, were as follows:[5]

POSITION

	39J	18N
Prior to 1500		
1459:07	North East of Tower 2 mi. heading 50°	Unknown – heading westerly from Parkersburg, W. Va.
1500-1501		
1500:16	Heading 100°	Unknown – heading westerly from Parkersburg, W. Va.
1501-1502		
1501:25	Heading 180°	Unknown – heading westerly from Parkersburg, W. Va.

occurred sometime between 1507:45 and 1508:00. At 1507:45 39 Juliet had traveled a distance of 4.4 miles in three minutes and fifty-eight seconds. Since the speed was well in excess of 60 m.p.h., 39 Juliet crossed the outer marker less than one minute after 1503:47.

[5] Information for the time sequence has been obtained in the following manner: Exhibit 45, the National Transportation Safety Board Aircraft Accident Report, contains at pages 81 to 90 typewritten communication between Approach Control and aircraft and transcription of the radio Tower and aircraft. Wherever stated in that exhibit, the times are accepted as accurate. In addition, Exhibit 46, also identified as Exhibit BH-43, contains a taped re-recording of the official tape. A stop watch has been used to determine the length of times between transcriptions which are not noted on the official tapes. Such times are to be considered as approximations only and are identified with an asterisk in this finding. In no event has the Court used such approximations for the basis of any findings of fact or of any conclusions of law. All times hereafter are referred to in terms of a 24-hour clock wherein the equivalent of 1500 hours is 3:00 p.m.

	39J	18N
1502-1503		
1502:26	Heading 260°	Unknown – heading westerly from Parkersburg, W. Va.
1503-1504		
1503:23	On the localizer	Unknown – heading westerly from Parkersburg, W. Va.
1503:47	On the localizer a mile from the marker	Unknown – heading westerly from Parkersburg, W. Va.
1504-1505		
1504:14½	On the localizer	2 mi. s. of Charlie Mike
1504:44½	On the localizer	down by Pandora's Box
1505-1506		
1505:34*	On the localizer	South of the approach course
1506-1507		
1506:41	On the localizer	In sight [of Tower]
1507-1508		
1507:45	A beam Western Electric	

Finding of Fact (7)

Knowledge of Parties

(A) Knowledge of 18 November – After contacting Local Control at 1504, Young was advised to plan to land on runway 28 left following the Lake Central Nord and to watch traffic coming up on the outer marker making an ILS low approach. The term, "coming up on the outer marker," indicates a position of such traffic at that time east of the outer marker. Because only 13 seconds had elapsed from the location of

39 Juliet at one mile from the outer marker, this statement was correct. At 1505:47* he was advised of the Lake Central Nord about a mile out of the airport and cleared to land on runway 28 left.

(B) Knowledge of 39 Juliet – Following the vectoring that had ended at 1502:26, 39 Juliet had received from Approach Control a clearance for a straight in ILS 28L approach. At 1503:47 he was advised that he was on the localizer one mile from the outer marker and spaced in reference to a Lake Central Nord three miles north of the airport. The term "spaced in reference to Lake Central Nord" is not a clearance to land nor is it a landing sequence. At 1507:45, 39 Juliet knew he was inside the outer marker since he advised Approach Control "a beam of Western Electric." No conversation at any time in this approach was had with Local Control.

(C) Knowledge of Approach Control – At 1502:26 Approach Control knew that 39 Juliet was heading 260° intending another missed approach. At 1503:47 he knew that 39 Juliet was on the localizer one mile from the outer marker. At 1504:34 Approach Control knew that 18 November was intending to land on 28 left. At 1504:44½ Approach Control knew that 18 November was in the vicinity of Pandora's Box heading for the approach to 28 left. At no time did Approach Control speak to 18 November. Alone of the four parties involved, Approach Control possessed all of the critical information. Two planes no more than three miles apart were planning to use the same runway approach and were converging thereon. The radar scope that had previously located 39 Juliet "one mile from the outer marker" and 18 November "down by Pandora's Box" was available to alert Approach Control of the decreasing separation between the two planes.

(D) The knowledge of Local Control – At 1503:23 he knew that 39 Juliet was on the localizer. At 1504 he knew that 18 November was 2 miles south of the outer marker. At 1505:44* he knew that 18 November was south of the approach and could see the Lake Central Nord. At 1505:51*

he was advised that 18 November would land a little long. At 1506:41 he had 18 November in sight and cleared him to land on runway 28 left. He had no precise knowledge of the location of 39 Juliet. Neither the communication of 1503:47 identifying 39 Juliet one mile from the outer marker nor the communication of 1507:45 identifying 39 Juliet "just a beam of Western Electric" was received by the Tower since these communications were on Approach Control frequency. Bearing on Local Control's lack of knowledge concerning the location of 39 Juliet is the fact that as late as 1507:44 he inquired whether that plane was within the outer marker.

Finding of Fact (9)

Miscellaneous Facts of Slight Significance

Evidence indicated an erroneous setting of the altimeter in 39 Juliet. This setting, the advice to Approach Control of the electronic equipment in 39 Juliet, the inaccurate air speed indicator in 18 November, and the angle of collision do not appear to be significant items in terms of proximate cause. Expert testimony established that the angle of difference between the headings of the two aircraft was approximately 30 degrees at the time of collision. While counsel have variously suggested that the inexperience of student pilot Dunnick, gusts of wind or erroneous headings might have caused such angle of collision, it does not appear that this angle bears upon the legal issue involved. None of the foregoing relates to proximate cause of the collision.

III

OPINION

In the opinion of this Court the evidence that has been adduced herein clearly indicates negligence on the part of Bibler. He failed to advise the Local Control that he had passed the outer marker. In fact, he continued to report to Approach Control until moments before the actual collision

when he stated that he was "a beam of Western Electric." Perhaps either a lapse of memory on his part or some other undiscoverable circumstance caused Bibler, an inexperienced pilot, to remain on Approach Control's frequency inside of the outer marker, where Approach Control had no jurisdiction. If we assume 39 Juliet was traveling at about 70 miles per hour, Bibler was traveling, for at least three minutes, inside of the outer marker and on Approach Control's frequency. It is difficult to justify this conduct or to find it to be non-negligent. The conduct additionally was a proximate cause of the collision because it placed Bibler in air space unknown to the Tower and not reasonably ascertainable by it on line of sight.

While it may be asserted that an agency of the defendant United States was also negligent in failing to instruct 39 Juliet to contact the Tower at the outer marker, such negligence cannot absolve the plaintiff.

Plaintiff's decedent, Ralph Bibler, was contributorily negligent because of his failure to contact the Tower as he passed the outer marker; to advise, for a period in excess of three minutes prior to the accident, that he was west of the marker; and to advise the Tower of his location "a beam of Western Electric." These failures on his part demonstrate that he neglected to exercise due care for his own safety.

There is insufficient evidence of negligence by either the Tower or defendant Barry Young. Based upon the information supplied to it by the other parties, Tower had reason to believe that Bibler was, at all times material to the events herein, east of the outer marker. The location of Bibler on the localizer at 1503:23 supplied Tower with only his compass heading. Bibler, at the time this transmission was received by the Tower, could have been as much as 20 miles east of the outer marker. As we have noted above, the transmission of 1503:47 which placed 39 Juliet on the localizer one mile from the outer marker was not received by the Tower. The failure of the Tower to locate 39 Juliet visually under the weather conditions prevail-

ing on the date of the accident does not rise to the level of proximate cause.

There was no apparent negligence on the part of defendant Young. He proceeded in accordance with information supplied to him by the Tower. He followed instructions by checking in with the Tower which cleared him to land, and he ultimately lined up his plane for landing in conformity with these instructions. We do not believe that the inaccuracy of his air speed indicator bears in any significant manner upon the issue of proximate cause.

Nor do we think that Young's failure to visually observe 39 Juliet constitutes negligence per se. The inherent configuration of small planes, such as both the Cherokee and the Bonanza, create substantial areas of non-visibility. The course that Young followed required a left turn prior to his final approach. By raising his right wing he additionally obliterated the area in which the Cherokee was traveling. This maneuver was necessary to his expected landing and there was no evidence that Young expected to or could have, at any time, seen 39 Juliet. He had no reason to anticipate Bibler west of the marker. We conclude that Young proceeded in the fashion of a reasonably prudent pilot. Plaintiff's evidence failed, in our opinion, to show specific acts of negligence on Young's part.

Finally, under settled principles of Ohio law, the doctrine of last clear chance has no application in the case at bar to relieve Bibler from the consequences of his own contributory negligence. It is true that Approach Control was the only entity that knew, at a time immediately prior to the accident, of the relative locations of the two planes. Beginning at 1503:47 it had precisely located 39 Juliet; at 1504:44 it had located 18 November. For a period of between three and four minutes Approach Control had the capability of noting that two planes were in a collision course. Ironically, Bibler's own contributory negligence in failing to contact Tower had the effect of retaining him on Approach Control's frequency. Approach Control could have instructed Bibler to take evasive

action or it could have advised Tower to order Young to do the same.

Approach Control's failure to do this, however, does not relieve Bibler from the effects of his contributory negligence through the doctrine of last clear chance. It was stated in *Brock* v. *Marlatt*, 128 O.St. 435, 438 (1934) that:

> The last clear chance rule has no application to any situation except where the injured party through his own negligence has placed himself in a position of peril. The doctrine presupposes his antecedent fault and negligence, as a result of which he is in a place of peril. His negligence does not absolve the defendant from liability, if, knowing such peril, defendant fails thereafter to exercise ordinary care to avoid causing injury. *Such charge is not proper where the claimed negligence of the defendant and the contributory negligence of the plaintiff are concurrent.* (emphasis added)

That the plaintiff's concurrent and on-going negligence prevents the application of the counter defense of last clear chance, was further underscored in *Cleveland Ry. Co.* v. *Masterson*, 126 O.St. 42, 51 (1932) where Justice Jones wrote that:

> It is only in those cases of prior negligence on plaintiff's part, not actively continuing to the time of injury, that the last clear chance rule applies.

Also see *Peters* v. *Transfer Co.*, 7 Ohio St.2d 143, 150 (1966); *Lones* v. *Detroit, Toledo and Ironton Ry. Company*, 398 F.2d 914, 920 (C.A. 6 1968) (applying Ohio law), *cert. denied* 393 U.S. 1063 (1969); *Pennsylvania Co.* v. *Hart*, 101 O.St. 196 (1920); *Columbus Green Cabs, Inc.* v. *Seip*, Ohio App., 65 O.L.Abs. 428, 115 N.E.2d 5 (1952); *Pflugh* v. *United States*, 138 F.Supp. 470 (W.D. Pa. 1951) (applying Ohio law).

As we have noted above, Bibler was negligent in failing to communicate with the Tower at the time he passed the outer marker. This negligence continued until and was concurrent

with the negligence that resulted in the accident. Because Bibler's negligence contributed to the proximate cause that resulted in his death, Ohio law bars his recovery. See *Bahm* v. *Pittsburgh & L.E. R. Co.*, 6 O.St.2d 192, 35 O.Ops.2d 307 (1966); *Lehman* v. *Leffler*, 78 O.St. 448 (1908); *Brown* v. *Northern Ohio Traction Co.*, 76 O.St. 234, 81 N.E. 328 (1907); *Northwest Airlines* v. *Glenn L. Martin Co.*, 224 F.2d 120 (C.A. 6 1955), *cert. denied* 350 U.S. 937 (1956); *Nice* v. *Pennsylvania Ry. Co.*, 168 F.Supp. 641 (N.D. Ohio E.D. 1959); *McDonough* v. *Buckeye S.S. Co.*, 103 F.Supp. 473 (N.D. Ohio E.D. 1952), *aff'd.* 200 F.2d 558 (C.A. 6 1952), *cert. denied* 345 U.S. 926 (1953). Since this negligence continued until the accident, the doctrine of last clear chance cannot alter this result.

IV

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this action under the Federal Tort Claims Act, 18 U.S.C. 1346(b).

2. The law of the State of Ohio, the place where the alleged acts or omissions of negligence took place, governs this action. See *Richards* v. *United States*, 369 U.S. 1 (1962).

3. Under the law of the State of Ohio contributory negligence of the plaintiff, if it contributes to the proximate cause of the accident, is a complete defense and bar to recovery. See *Brown* v. *Northern Ohio Traction Co., supra; Lehman* v. *Hayman, supra; Nice* v. *Pennsylvania Ry. Co., supra; McDonough* v. *Buckeye S.S. Co., supra.*

4. Federal Aviation Regulations provide that the pilot-in-command is responsible for, and is the final authority as to, the operation of that aircraft. See 14 C.F.R. 91.3; *United States* v. *Miller*, 303 F.2d 710 (C.A. 9 1962); *United States* v. *Schultetus*, 277 F.2d 322 (C.A. 5 1960), *cert. denied* 364 U.S. 828 (1960); *Hamilton* v. *United States*, No. C-48398, — F. Supp. — (N.D. Calif. Oct. 21, 1971).

5. Federal Aviation Regulations provide that no person may within an airport traffic area, or in the case of Port Columbus within the outer markers, operate an aircraft to, from or on an airport having a control tower operated by the United States unless two-way radio communications are maintained between that aircraft and the control tower. See 14 C.F.R. 91.87.

6. Bibler's failure to contact the tower once he passed over the outer marker was negligence as a matter of law.

7. Bibler's conduct, as it violated the conclusions of law set forth in Nos. 5 and 6 above, constitutes contributory negligence as a matter of law and bars his recovery under the authorities cited in Conclusions of Law Nos. 2 and 3.

8. The paramount responsibility for the safe operation of aircraft under VFR weather conditions continues to rest with the pilot of the aircraft. See *United States* v. *Miller, supra; United States* v. *Schultetus, supra; Hamilton* v. *United States, supra; Compagnie Nationale Air France* v. *Port of New York Authority, et al.*, 10 Avi. 18, 356 (E.D. N.Y. 1969), *aff'd.* 427 F.2d 951 (C.A. 2 1971); *American Airlines, Inc.* v. *United States*, 418 F.2d 180 (C.A. 1 1969); *Stanley* v. *United States*, 239 F.Supp. 973 (N.D. Ohio 1969); *Tilley* v. *United States*, 375 F.2d 678 (C.A. 4 1967).

9. Bibler's negligence continued from the time his plane passed the outer marker until the time of impact and contributed to the proximate cause of his injuries. Therefore, under Ohio law, the doctrine of last clear chance does not relieve him of the consequences of his contributory negligence. See *Cleveland Ry. Co.* v. *Masterson, supra; Brock* v. *Marlatt, supra; Lones* v. *Detroit, Toledo & Ironton Ry. Co., supra;* and cases cited at 14, *supra.*

10. The evidence fails to establish negligence, as a matter of law, on the part of defendant Young.

11. Since the negligence of the plaintiff's decedent was a proximate cause of the accident, plaintiffs cannot recover.

12. For the reason set forth in Conclusion of Law No. 11, Sundin, the decedent's master and plaintiff in No. 70-82, cannot recover because of the contributory negligence of his servant.

13. Plaintiffs' causes of action must be dismissed.

14. For the reasons set forth in Conclusions of Law Nos. 11 and 12, defendant United States of America's cross-claims will be dismissed as moot.

15. Defendant United States of America is entitled to a judgment in its favor.

The parties shall submit a form of judgment, in accordance with the views and conclusions expressed herein, within ten (10) days from the filing date hereof. No costs.

It is so ORDERED.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX D.

TERMINAL AIR TRAFFIC CONTROL MANUAL

• • •

674. ARRIVAL INSTRUCTIONS.

Issue all of the following to an aircraft before it reaches the approach gate: (E)

a. Position with respect to the final approach fix.

b. Vector to intercept the final approach course, if required.

c. Approach clearance, except when conducting a surveillance or precision approach.

d. Instructions to do one of the following:

(1) *Monitor local control frequency,* reporting to the tower when over the approach fix.

(2) Contact the tower on local control frequency.

(3) Contact approach control on final approach frequency if a surveillance or precision approach will be made.

(4) *When radar is used to establish the final approach fix – inform the pilot that after being advised that he is over the fix, he is to contact the tower on local control frequency.*

APPENDIX E.

EXCERPTS FROM FAA INSTRUMENT FLYING HANDBOOK

Airport Traffic Control Towers

Jurisdiction – The ATC tower is responsible for control of aircraft on and in the immediate vicinity of airports. Terminals handling a large traffic volume employ specialized personnel for operation; they use light signals, radio, and ASDE radar (Airport Surface Detection Equipment) for control of surface traffic. Less congested airports have fewer controllers to handle the workload with less specialization. Organization of the tower operation falls into the following units:

Local Control is concerned mainly with VFR traffic in and around the traffic pattern and with ground traffic. The local controller works with the other IFR controllers to integrate VFR and IFR flights into a smooth, safe traffic flow in and out of the airport.

Ground Control directs the movement of aircraft on the airport surface, working closely with other tower positions. The controller relays clearances from ARTCC to departing IFR flights unless a special position is assigned that function.

Clearance Delivery is accomplished by a separate controller at most busy terminals where heavy ground traffic and frequent IFR departures require division of the workload.

Departure Control originates departure clearances and instructions to provide separation between departing and arriving flights. Although the physical location of this controller varies at different terminals – in the tower at some locations, in separate radar installations at others – he coordinates closely with the Approach Controller and Local Controller.

Approach (Arrival) Control formulates and issues approach clearances and instructions to provide separation between arriving IFR aircraft, using radar if available.

APPENDIX F.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-1201

ANN E. BIBLER, ADMINISTRATRIX OF THE ESTATE OF RALPH D. BIBLER, DECEASED, ON BEHALF OF HERSELF AS SURVIVING SPOUSE AND MINOR CHILD, AND DONALD L. SUNDIN D/B/A SUNDIN AVIATION CO.,

Plaintiffs-Appellants,

vs.

BERRY H. YOUNG, Jr.; OHIO AVIATION COMPANY, OHIO AVIATION DISTRIBUTORS, INC.; DAYTON MUNICIPAL AIRPORT; UNITED STATES OF AMERICA; AND THE FEDERAL AVIATION ADMINISTRATION, PORT COLUMBUS AIRPORT,

Defendants-Appellees.

Before: WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

JUDGMENT

(Filed February 27, 1974)

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be and the same are hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiffs-Appellants, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

A True Copy.
Attest:

/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: April 9, 1974
COSTS: Awarded to Appellee

SUPREME COURT, U. S.
FILED
AUG 26 1974

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-17

ANN E. BIBLER, ADMX. OF THE ESTATE OF RALPH BIBLER, DECEASED, ET AL.,
Petitioners,

vs.

BERRY H. YOUNG, JR., ET AL.,

and

THE UNITED STATES OF AMERICA and THE FEDERAL AVIATION ADMINISTRATION,
Respondents.

BRIEF OF RESPONDENTS BERRY H. YOUNG, JR., ET AL., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-17

ANN E. BIBLER, ADMX. OF THE ESTATE OF RALPH BIBLER, DECEASED, ET AL.,

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Respondents.

BRIEF OF RESPONDENTS BERRY H. YOUNG, JR., ET AL., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Title 14 C.F.R., Section 91.75 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except

in an emergency, unless he obtains an amended clearance. However, except in positive controlled airspace, this paragraph does not prohibit him from cancelling an IFR flight plan if he is operating in VFR weather conditions.

(b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircraft contrary to an ATC instruction.

(c) Each pilot in command who deviates, in an emergency, from an ATC clearance or instruction shall notify ATC of that deviation as soon as possible.

(d) Each pilot in command who (though not deviating from a rule of this subpart) is given priority by ATC in an emergency, shall, if requested by ATC, submit a detailed report of that emergency within 48 hours to the chief of that ATC facility.

STATEMENT OF THE CASE

This matter involves four (4) separate claims. The first is a wrongful death claim asserted in the case of *Ann E. Bibler, as Administratrix of the Estate of Ralph D. Bibler* v. *Berry H. Young, Jr., Ohio Aviation Company, Ohio Aviation Distributors, Inc., The United States of America and The Federal Aviation Administration,* Case No. 70-56, in the United States District Court for the Southern District of Ohio, Eastern Division. Jurisdiction in that case is based on diversity of citizenship, Title 28 U.S.C., Section 1332, and The Federal Tort Claims Act, Title 28 U.S.C., Section 1346 (b). Cross-claims were made by the United States of America against the three co-defendants in that case.

The second claim is for property damage to a Piper Cherokee airplane of which the decedent, Ralph D. Bibler, was pilot-in-command and which airplane was owned by Donald L. Sundin d/b/a Sundin Aviation Company. That claim is the subject of the case of *Donald L. Sundin d/b/a*

Sundin Aviation Company v. *United States of America and the Federal Aviation Administration*, Case No. 70-82, in the United States District Court for the Southern District of Ohio, Eastern Division. Jurisdiction in that case is based on The Federal Tort Claims Act, Title 28 U.S.C., Section 1346 (b). Third-party claims were made by the United States of America against Berry H. Young, Jr., The Ohio Aviation Company and Ohio Aviation Distributors, Inc. in that case.

The third claim is for the same property damage to the Piper Cherokee airplane and was originally asserted in the case of *Donald L. Sundin d/b/a Sundin Aviation Company* v. *Ohio Aviation Company, Ohio Aviation Distributors, Inc. and Berry H. Young, Jr.*, Case No. 23991, in the Court of Common Pleas, Franklin County, Ohio. Ohio Aviation Distributors, Inc. was the owner of the Beechcraft Bonanza 18N, and it counterclaimed against said Donald L. Sundin in that case for damage to the Beechcraft Bonanza. This is the fourth claim which is a subject of this matter. There was no diversity of citizenship or other basis for federal court jurisdiction of the subject matter in that case.

The above Cases Nos. 70-56 and 70-82 were consolidated for trial to the Court. The claims asserted in the Common Pleas Court were submitted to the District Court on the Common Pleas Court pleadings by stipulation of the parties for trial along with Cases Nos. 70-56 and 70-82. Decedent Ralph D. Bibler was an employee of Donald L. Sundin d/b/a Sundin Aviation Company. Berry H. Young, Jr. was an employee of The Ohio Aviation Company but was neither an employee nor an agent of Ohio Aviation Distributors, Inc.

The accident out of which these four (4) claims arose occurred on April 10, 1968, at Port Columbus Interna-

tional Airport (hereafter called Port Columbus) within the airport traffic area (five (5) mile radius). Port Columbus had an F.A.A. air traffic control facility which provided aircraft approach control services and tower services (local and ground). The approach control radio frequency in use was 119.OHz. The tower local control radio frequency in use was 120.5Hz. At the time of the accident, the weather conditions were such as to make the F.A.A. visual flight rules applicable.

Prior to and at the time of the accident, decedent Ralph Bibler was giving a student instrument flight instructions in Cherokee 39J on the approach course to Port Columbus Runway 28 Left. That runway lay in an easterly-westerly direction. The approach to Runway 28 Left was from east to west. On the first simulated instrument approach. Cherokee 39J was given compass directions by approach control to guide it in alignment with the approach to Runway 28 Left. Prior to the time Cherokee 39J passed the outer marker (the point at which descent was to commence), approach control told Cherokee 39J to contact the tower at the outer marker. Cherokee 39J followed those instructions and received clearance to continue his descent towards Runway 28 Left. That first simulated approach was terminated by Cherokee 39J just short of the runway when the airplane began climbing to a higher altitude and executing a right turn (missed approach). Cherokee 39J then re-contacted approach control as he had previously been instructed to do. At the time of the accident, Cherokee 39J was attempting a second simulated instrument approach. At no time did Cherokee 39J intend to land on Runway 28 Left.

At approximately 3:04 P.M., approach control informed Cherokee 39J that he was on the localizer (radio directional beam on approach course) a mile from the outer marker

and that he was spaced in reference to a Lake Central Nord located about three (3) miles north of the airport. The Nord would be landing on Runway 28 Left. Cherokee 39J acknowledged the approach control transmission. However, approach control did not instruct Cherokee 39J to contact the tower on frequency 120.5Hz at the outer marker as approach control had done on the first simulated approach. From that time (a mile from the outer marker) until the time of the mid-air collision well inside the outer marker and the five (5) mile airport traffic area, Cherokee 39J made no transmission to either approach control or to the tower local controller until the approximate time of the collision. Neither did the approach controller make any transmissions to Cherokee 39J. The tower local controller could not transmit to Cherokee 39J because at no time on the second approach did Cherokee 39J switch to the tower local controller's frequency.

At approximately 3:04 P.M., Mr. Young, piloting Bonanza 18N, called the tower local controller on frequency 120.5Hz and reported his position as two (2) miles south of the outer marker (Charlie Mike). The tower local controller instructed Bonanza 18N to plan Runway 28 Left as No. 2 aircraft, the aircraft following the Nord, which was No. 1. The only warning received concerning any other traffic was that Bonanza 18N should watch for traffic coming up on the outer marker making an instrument landing system (ILS) low approach. Low approach means without landing. After other transmissions, the tower local controller asked Bonanza 18N if he had sighted the Nord. After first responding "negative", Bonanza 18N reported identification of the Nord. A short while later the tower local controller told Bonanza 18N that he (the local controller) had the Bonanza in sight and stated, "You're cleared to land 28 Left." Bonanza 18N

acknowledged receiving this transmission. After being alerted to the fact that the two (2) airplanes were in close proximity on the approach to Runway 28 Left, the tower local controller attempted to call Cherokee 39J then attempted to call Bonanza 18N. The transmission to Bonanza 18N occurred a slight instant after the collision. It appears that Cherokee 39J was below and in front of Bonanza 18N and could not be seen by Mr. Young. Cherokee 39J crashed and Mr. Bibler and the student were killed. Mr. Young safely executed a forced landing of Bonanza 18N in a nearby field (A. 4-12).

After trial to the Court, the District Court implied that the approach controller was negligent in failing to warn Bibler or the tower controller of the converging paths of Cherokee 39J and Bonanza 18N (A. 28) and in failing to advise Cherokee 39J to contact the tower local controller at the outer marker (A. 30). However, the District Court further found that Mr. Bibler was contributorily negligent in failing to maintain two-way communications with the control tower and in failing to contact the tower once he passed the outer marker (A. 34). Negligence on the part of the approach controller was assumed (A. 28). Mr. Young was found not negligent (A. 34).

The Sixth Circuit Court of Appeals affirmed the District Court's determination that Mr. Bibler was contributorily negligent, doing so in part as a matter of law (A. 14) and in part as a finding of fact supported by the weight of the evidence (A. 15) and that such negligence was a proximate cause of the collision (A. 17-18). The Sixth Circuit Court of Appeals also assumed that the approach controller was negligent (A. 18) and determined that Mr. Young (Bonanza 18N) had the right of way under Title 14

C.F.R., Section 91.67 (f). By virtue of Mr. Bibler's contributory negligence, all plaintiffs' claims were dismissed as required by Ohio law (A. 15, 17-18).

OBJECTIONS TO GRANTING A WRIT OF CERTIORARI

1. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF OTHER COURTS OF APPEALS.

The District Court, in its opinion, made the following statements concerning the approach controller:

> "While it may be asserted that an agency of the defendant United States was also negligent in failing to instruct 39 Juliet to contact the Tower at the outer marker, such negligence cannot obsolve the plaintiff." (A. 30)
>
> * * *
>
> "It is true that Approach Control was the only entity that knew, at a time immediately prior to the accident, of the relative positions of the two planes. Beginning at 1503:47 it had precisely located 39 Juliet; at 1504:44 it had located 18 November. For a period of between three and four minutes Approach Control had the capability of noting that two planes were in a collision course. Ironically, Bibler's own contributory negligence in failing to contact Tower had the effect of retaining him on Approach Control's frequency. Approach Control could have instructed Bibler to take evasive action or it could have advised Tower to order Young to do the same.
>
> Approach Control's failure to do this, however, does not relieve Bibler from the effects of his contributory negligence through the doctrine of last clear chance. . . ." (A. 31-32)

The Sixth Circuit Court of Appeals also recognized that the approach controller at Port Columbus had been negligent by stating:

> "He (the District Judge) also held that the approach controller at the Port Columbus Airport was guilty of negligence for failing to tell pilot Bibler to contact local control. But he held that this negligence was not the proximate cause of the accident." (A.3)

The above quotations from the opinions of the District Court and the Sixth Circuit Court of Appeals demonstrate that both Courts judged the conduct of the approach controller by the same standard of care which has been explicitly stated in the cases cited by Petitioners. The apparent reason why the lower Courts did not further expound on that standard is the findings both as a matter of fact and as a matter of law that Mr. Bibler was contributorily negligent. This pivotal contributory negligence issue also distinguishes this matter from most of the cases cited by Petitioners and explains why there should be no review of the judgments below. (A. 12, 15 and 33)

The case of *Eastern Air Lines* v. *Union Trust Co.*, 221 F. 2d 62 (D. C. Cir. 1955), *aff'd. subnom., United States* v. *Union Trust Co.*, 350 U.S. 907 (1955), involved a claim for the wrongful causing of the death of passengers on an Eastern Airlines DC-4 who were killed as the result of a collision between the DC-4 and a P-38 military aircraft. There was no defense of contributory negligence to the claim for the deaths of the passengers. The passengers were passive participants in a tragic event. Both aircraft had been cleared for the same runway at the same time. The judgment against Eastern Airlines was reversed and remanded for a new trial. The United States, however, was found negligent for the breach by the air traffic

control personnel of their duty to warn each aircraft of the other's presence. This duty is identical to that recognized by the District Court and quoted above.

The case of *Indian Towing Company, Inc.* v. *United States*, 350 U.S. 61 (1955), states the same principle. This Court held that the coast guard had the duty to use due care in operating a lighthouse, and, if the light became extinguished, it had the duty to use due care to discover that the light had been extinguished and to give a warning of such to appropriate persons. Again, this is the same standard recognized by the lower Courts as quoted above.

The case of *Ingham* v. *United States*, 373 F. 2d 227 (2d Cir. 1967), *cert. denied*, 389 U.S. 931 (1967), also involved claims for the wrongful causing of the death and for injuries to passengers on a commercial airliner which crashed at Idlewild International Airport. Suit was brought against both Eastern Airlines and the United States. Two test cases were tried: one against Eastern Airlines and one against the United States. The claim was that the air traffic controllers had a duty to warn the pilots of the airliner about a crucial change in weather conditions. The trial court held that there was such a duty. The Court of Appeals went further and specificially found that such failure was a violation of the F.A.A.'s Air Traffic Control Procedure Manual which provided that the controller should give advice as to weather conditions and subsequent changes as necessary. Again there was no defense of contributory negligence to the claims made in that case.

United States v. *Furumizo*, 381 F. 2d 965 (9th Cir. 1967), involved a claim for the wrongful causing of the death of a student pilot who died when the small plane in which he was riding crashed after it had encountered wake turbulence caused by the take-off of a large aircraft. The Court of Appeals noted that the pilot in command had a

duty of avoiding the danger of wake turbulence and also demonstrated that the instructor in command of the small plane had been found negligent. The Court of Appeals also affirmed the District Court's finding that the student had not been negligent. Affirming the judgment against the United States, the Court held that the controllers' job required that they act in the interest of safety and warn a pilot whom they observe is taking off when it is apparent to such controllers that the pilot will encounter a severe hazard.

The case of *Hartz* v. *United States*, 387 F. 2d 870 (5th Cir. 1968), involved claims for the wrongful causing of the death of the pilot, Mr. Hartz, and the death of a passenger, Mr. Roth, who were killed when their Beechcraft Bonanza encountered wake turbulence created by the take-off of a DC-7. One of the issues in the case was the negligence of the pilot, Mr. Hartz. There was no issue as to any negligence on the part of the passenger, Mr. Roth. The District Court held that the controller had no duty to do anything more than maintain separation of aircraft to avoid a collision and that the negligence of Mr. Hartz was the sole proximate cause of the crash. Such holding prevented recovery by the passenger, Mr. Roth. On review, the Court of Appeals held, at page 874 of the opinion:

> "We hold that the controller gave Hartz a warning which was neither sufficient under the manual nor adequate to caution Hartz of a possible danger which was then known to the controller. The failure of the controller to properly caution Hartz of the possible danger of wing tip vortex imposed upon the controller an additional duty to delay take-off clearance for the Bonanza for such period as was reasonably necessary to permit such turbulence from the DC-7

> to dissipate. The controller's breach of duty clearly was a proximate cause of the crash of the Bonanza. . . ."

Based on this holding, the Court of Appeals reversed and remanded for further proceedings not inconsistent with the opinion. The net result was that recovery could be had against the United States at least for the death of the passenger, Mr. Roth.

The case of *Spaulding* v. *United States*, 455 F. 2d 222 (9th Cir. 1972), involved claims for the wrongful death of Dorman D. Michelmore (pilot), John B. Michelmore (passenger and son of pilot) and Jack E. Spaulding (passenger). Neither of the passengers were pilots. A judgment was rendered in the trial court against all plaintiffs. Only the claims on behalf of the estates of the decedent passengers were appealed. The appellate court stated the duty of the air traffic controller as follows at page 226 of the opinion:

> "The air traffic controller is required to give all information and warnings specified in his manuals, and in certain situations he must give warnings beyond the manuals. This duty to warn is based on the simple tort principle that once the government has assumed a function or service, it is liable for negligent performance.
>
> The controller's duty to warn does not, however, relieve the pilot of his primary duty and responsibility. . . ."

Again, as in most of the above cases, there was no defense of contributory negligence to the claims for the deaths of the passengers.

The case of *Gill* v. *United States*, 429 F. 2d 1072 (5th Cir. 1970), also involved a claim for the wrongful death of two passengers. Claims for the death of those passengers

had previously been made against the estate of the decedent pilot and were settled. Suit was brought against the United States. The Court of Appeals affirmed the District Court's finding that the radar approach controller was negligent in furnishing "in-flight weather information which was inexact, incomplete and in all reasonable probability misleading." The Court remanded the case solely for determination as to whether, as an issue of fact, the pilot had been negligent, because, if so, under the law of Texas, the United States was entitled to a reduction of the judgment against it by one-half. In that case contributory negligence of the pilot was a significant factor even though the air traffic controllers had a duty to warn the pilot.

Finally, the case of *United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir. 1964), involved claims for the wrongful causing of the deaths of passengers of a commercial airliner resulting from a collision between the airliner and an Air Force jet fighter. There was no contributory negligence defense to the claims for the deaths of the passengers.

The Court of Appeals held at pages 397-98 of the opinion:

> "A warning to others of dangerous flying activity being conducted by the government would have been a precaution dictated by the exercise of ordinary care. We therefore affirm the District Court's holding that it was negligence at the operational level of the government to fail to inform United of the details of the government's hazardous activity involved in the KRAM procedure prior to authorizing Flight 736 to travel into the area where such activity was likely to be encountered. . . ."

These Respondents respectfully submit that the opinions of both the District Court and the Sixth Circuit Court

of Appeals in this matter show that those Courts did apply the standard of care explicitly set forth in the cases reviewed above. What occurred in the District Court and the Court of Appeals in this matter is almost identical to what occurred in the District Court in *United States* v. *Furumizo*, 381 F. 2d 965 (9th Cir. 1967). In that case Baker Aircraft Sales, Inc. (Baker) was one of the appellants. Baker argued that the District Court made no finding that its pilot-employee, the instructor in the airplane, was negligent. The Court of Appeals agreed that there was no direct finding that Shima (the employee) was negligent. However, the Court of Appeals made the following comments and reached the following conclusion at page 969 of the opinion:

> "The trial judge thought that he had made such a finding, as is indicated by a colloquy between court and counsel on motion for a new trial. In that the court was mistaken, and such a situation would normally require a remand for further findings on the issue. Here, however, it is apparent from the record that the court intended to make the finding; presumably it would do so on remand. We think that such a remand is unnecessary here. All that Baker seeks, in relation to the first theory, is an opportunity to convince the trial judge that Shima was in fact fully informed about the danger of wake turbulence, thus showing that Baker was not negligent in employing him as an instructor. But if Baker succeeded in proving that, it would bring itself within the second theory, the one on which the case was tried. As the trial court said (paragraph 38):
>
> > 'Had Shima been an adequately trained pilot, and had he been adequately instructed and made fully aware of the dangers of large plane wake turbulence to small planes, the Court cannot believe that he would have taken off at the time and

> under the circumstances he did, the evidence indicating that he was a careful and prudent person, not one given to taking undue chances. A well-trained pilot, adequately schooled in the actual dangers to planes of the size of this Piper of turbulence created by planes of the size of the DC-8, would have done what the pilots of the C-47 did — wait until a reasonable time had elapsed to allow the most violent aspects of the turbulence to dissipate before taking off. * * *'.
>
> To have done anything else would certainly have been negligent. In substance, then, the trial court's findings do embody the second theory. Remand for a more specific finding would be a triumph of form over substance."

Likewise, the lower Courts in this matter did not make a specific finding that the duty to warn was breached by the approach controller. It is apparent, however, that both the District Court and the Sixth Circuit Court of Appeals considered the approach controller negligent in failing to follow the procedure set forth in the controller's manual and in failing to give appropriate warnings of the impending collision of which the approach controller was the only one in a position to know all the facts. Therefore, these Respondents respectfully submit that the decision of the Sixth Circuit Court of Appeals does not conflict with the decisions of other Courts of Appeals as to the standard of care required of government air traffic controllers.

2. THE INTERPRETATION OF TITLE 14 C.F.R., SECTION 91.87, ADOPTED BY THE COURT BELOW IS CORRECT AND DOES NOT CREATE ANY PROBLEMS FOR SAFE OPERATION OF AIR TRAVEL.

These Respondents respectfully submit that the interpretation given by the Sixth Circuit Court of Appeals to the term "control tower" as used in Title 14 C.F.R., Section 91.87 (b), is correct and in accordance with the general usage and understanding of that term by both the Federal Aviation Administration and experienced pilots through the useage of that term in the regulations and the Airman's Information Manual.

Title 14 C.F.R., Section 91.87 (b), provides:

> "No person may, within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States *unless two-way radio communications are maintained between that aircraft and the control tower.*" (Emphasis added.)

Plaintiffs' Exhibit 51, Airman's Information Manual, p. 1-1, (R. 4), gives the following definition:

> "AIR TRAFFIC CONTROL SERVICE (CONTROL) — A service provided for the purpose of promoting the safe, orderly, and expeditious flow of air traffic, including *airport*, *approach*, and *enroute air traffic control service*." (Emphasis added.)

Finally, Plaintiffs' Exhibit 51, Airman's Information Manual, p. 1-84, (R. 4), provides:

> "LANDING — TOWER-CONTROLLED AIRPORTS — 1. When operating to an airport where traffic control is being exercised by a control tower,

pilots are required to maintain two-way radio contact with the tower while operating within the airport traffic area unless the tower authorized otherwise. Initial call-up should be made about 15 miles from the airport. (see 'Decrease Frequency Congestion' under GOOD OPERATING PRACTICES)

2. When necessary, the *tower controller* will issue clearances or other information for aircraft to generally follow the desired flight path (traffic patterns) when flying in the airport traffic area/control zone, and the proper taxi routes when operating on the ground. . . ." (Emphasis added.)

The Airman's Information Manual defines the term "Air Traffic Control Service" (ATC) as including three functions: airport traffic control service, approach traffic control service and enroute traffic control service. Further, in reference to Section 91.87 (b), the Airman's Information Manual specifically interprets the term "control tower" as being the "tower controller". Consequently, the information available to all pilots and the knowledge with which pilots are charged clearly supports the Sixth Circuit Court of Appeals' determination that the term "control tower" meant the "local controller". See *Stanley* v. *United States*, 239 F. Supp. 973, 975 (N.D. Ohio E.D. 1965).

In addition, these Respondents submit that simply having one's radio tuned to a particular frequency is not "radio communications" within the meaning of Title 14 C.F.R., Section 91.87 (b). Petitioners repeatedly argue that Mr. Bibler, by having his radio tuned to the approach control frequency, was in "contact" with the "control tower". Section 91.87 (b) does not simply require "contact". It requires "communications". The findings of fact of the District Court as quoted in the Sixth Circuit of Appeals' opinion clearly demonstrate that Mr. Bibler did not main-

tain "communications". According to those facts, a period of approximately four (4) minutes passed during which Mr. Bibler spoke to no one. The District Court found:

> "At 1503:17, 39 Juliet was noted by approach control as 'on the localizer' a mile from the marker." (A. 8, 24)
>
> * * *
>
> "At 1507:45, 39 Juliet knew he was inside the outer marker since he advised approach control 'a beam of Western Electric.' No conversation at any time in this approach was had with local control." (A. 11 and 28)

Anyone can sit by a silent radio and in a very technical sense be in contact with the party at the other end. Such silent contact, however, should not be considered "communication" in a circumstance where the very purpose of the radio contact is for the communication of information designed to protect all the parties concerned.

Respondents respectfully submit that the lower Courts have properly interpreted Title 14 C.F.R., Section 91.87 (b), as it existed at the time of the accident and that the findings of fact, which petitioners do not dispute, show a clear violation of that regulation. Therefore, the decision of the Sixth Circuit Court of Appeals does not create any problems which will affect the safe operation of air travel.

3. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION AND APPLICATION OF TITLE 14 C.F.R., SECTION 91.67.

The facts recited by the Sixth Circuit Court of Appeals and which are relevant to this objection are as follows:

> "At the time and place concerned Young had a clearance to land and was proceeding according to it. Bibler did not have a clearance to land; he had only a clearance to approach." (A. 18)

> "At 1503:47 he (Bibler) was advised that he was on the localizer one mile from the outer marker and spaced in reference to a Lake Central Nord three miles north of the airport. The term 'spaced in reference to Lake Central Nord' is not a clearance to land nor is it a landing sequence." (A. 11)

Plaintiffs' Exhibit 51, Airman's Information Manual, p. 1-1, (R. 4) provides:

> "Approach Sequence — the order in which aircraft are positioned while awaiting approach clearance or while on approach."

There is no dispute as to the fact that Cherokee 39J (Bibler) never did intend to land on Runway 28 Left. At no time was he on "final approach to land" or "landing". He was only sequenced behind the Nord (A. 11).

It appears that Petitioners completely missed the basis upon which the Sixth Circuit Court of Appeals concluded that Mr. Young had the right of way over Mr. Bibler. Paragraphs (e) and (f) of Title 14 C.F.R., Section 91.67, contain three sentences (A. 1). Each of those sentences

apply to different situations. Paragraph (e) is very general providing that an aircraft which is being overtaken has the right of way and that the overtaking aircraft shall alter course to the right. By its very nature, this provision indicates that it applies to enroute flight. It would not be logical to suggest that the second of two aircraft approaching the same runway should pass to the right. It would be more logical to provide for some other maneuver.

The first sentence of paragraph (f) specifically gives the right of way to an aircraft "on final approach to land" or "landing" (A. 1). The second sentence of paragraph (f) specifically provides for the situation where two (2) or more aircraft are approaching an airport for the "purpose of landing". If Mr. Bibler, who had no intention of landing at any time, is to be treated, as Petitioners infer, as if he were on final approach to land, then there is no reason for the distinction provided in the two sentences contained in Title 14 C.F.R., Section 91.67 (f). Thus it is apparent that the Sixth Circuit Court of Appeals based its decision that Mr. Young had the right of way on the specific and clear provisions of the first sentence of paragraph (f) rather than the note to Title 14 C.F.R., Section 60.14, as Petitioners claim. Further, the cases cited by Petitioners are distinguishable on the facts.

In *United States* v. *Miller*, 303 F. 2d 703 (9th Cir. 1962), Miller, who was piloting a Beechcraft had been cleared by radio to enter the traffic pattern but had not received a clearance for landing. The other aircraft, a Cessna, was doing touch and go landings. The Cessna was receiving instructions by means of light signals flashed with a light from the tower. At the time of the collision, it appears neither aircraft had been cleared. Consequently, the Court applied the general right of way regulation contained in paragraph (e) of Title 14 C.F.R., Section 91.67.

In *New York Airways, Inc.* v. *United States*, 283 F. 2d 496 (2d Cir. 1960), the aircraft involved was a helicopter which could safely stop its movement (hover) and make any maneuver desirable in order for the pilot to be assured that the spot on which he intended to land was free of surface vehicles. No right of way regulation was involved in that case.

In *George* v. *American Airlines, Inc.*, 295 F. 2d 311 (7th Cir. 1961), the two (2) aircraft were converging at approximately forty-five (45) degrees. The pilot of the defendant's aircraft did not see the other military aircraft until it was about "five seconds" away. In taking evasive action to avoid a collision, the pilot put the defendant's airliner into a dive resulting in injury to the plaintiff. The Court determined that the defendant was negligent because of the pilot's failure to maintain a proper lookout. There is no question of right of way nor is there any indication that, had the United States been sued, the crew of the military aircraft would not have been found negligent also.

Petitioners also argue that Mr. Young had an obligation to see Mr. Bibler's airplane. Respondents respectfully submit that Mr. Bibler also had an obligation to see Mr. Young's airplane. The facts as recited by the District Court and the Sixth Circuit Court of Appeals show that for a substantial period prior to the collision, the two (2) aircraft were converging from a spread of two (2) miles separation north to south at the approximate point of the outer marker to the point of the collision a slight distance short of the runway (A. 9-10).

Having been cleared to land, Mr. Young was obligated by Title 14 C.F.R., Section 91.75, to proceed directly to the runway and land. In fact, he was prohibited from doing otherwise. The significance of a clearance to land is explained in *Eastern Air Lines* v. *Union Trust Co.*, 221

F. 2d 62 (D.C. Cir. 1955), at page 65, in footnote 3, as follows:

> "The Administrator of Civil Aeronautics was called by the court as a witness on the meaning of the phrase 'cleared to land.' He testified that when a plane in the traffic pattern of an airport is 'cleared to land,' the pilot of the plane is thereby authorized to commence his landing approach operation immediately; in other words, when a pilot receives that clearance, wherever he may be in the traffic pattern, there is no plane ahead of him and he may make his turn at his discretion and consistently with the safe management of his plane, and may come in and land at once on the runway which has been designated by the tower. That this is the only meaning of the phrase 'cleared to land' was the unanimous testimony of all the certified air traffic controllers who testified on the subject. The trial judge instructed the jury as a matter of law that such was the meaning of the phrase 'cleared to land'."

Having received a clearance and in view of the obligation Mr. Bibler had to maintain communications with the control tower, Mr. Young had the right to assume that the aircraft "coming up on the marker," would contact the control tower and not be negligent. This conclusion is based on the rule set forth in *Svoboda* v. *Brown*, 129 Ohio St. 512, 196 N.E. 274 (1935), in the eighth paragraph of the syllabus as follows:

> "One may rightfully assume the observance of the law and the exercise of ordinary care by others, and action by him in accordance with such assumption in the absence of notice or knowledge to the contrary is not negligence."

See also *Hood* v. *New York, Chicago & St. Louis Rd. Co.*, 166 Ohio St. 529, 144 N.E. 2d 104 (1957); *Chambers* v.

McFerren, 168 Ohio St. 398, 155 N.E. 2d 917 (1959); *Ricks* v. *Jackson*, 169 Ohio St. 254, 159 N.E. 2d 225 (1959).

By virtue of Title 14 C.F.R., Section 91.87 (b), both Mr. Bibler and Mr. Young were required to *maintain* communications with the control tower when within the airport traffic area. Mr. Young, even though being told of an aircraft coming up on the marker, had a right to assume that Mr. Bibler would establish and maintain communications with the control tower. Had Mr. Bibler done so, Mr. Young would have heard the transmissions to and from Cherokee 39J and could have done something to avoid the collision. Mr. Young had no knowledge of the entrance of Cherokee 39J into the airport traffic area which would have permitted Mr. Young to take action to avoid the collision. Consequently, Mr. Young was not negligent for his failure to see Cherokee 39J.

Respondents respectfully submit that the F.A.A. regulations and the law of Ohio were correctly applied by the Sixth Circuit Court of Appeals and that there is no conflict between that decision and decisions of other Courts of Appeals as to the proper interpretation of Title 14 C.F.R., Section 91.67.

4. A WRIT OF CERTIORARI IS NOT TO BE GRANTED TO GIVE THE DEFEATED PARTY ANOTHER HEARING ON THE FACTS.

Even if the writ of certiorari were granted in this matter, Petitioners would gain no benefit unless this Court were willing to review the evidence, the findings of fact and the conclusions of law made by the District Court as to

Mr. Bibler's contributory negligence. This Court has indicated that a writ of certiorari will not be granted for that purpose.

In *Boehmer* v. *Pennsylvania Railroad Company*, 252 U.S. 496, 40 S. Ct. 409, 64 L. Ed. 680 (1920), *certiorari granted*, 248 U.S. 554, 39 S. Ct. 10, 63 L. Ed. 419, *affirming*, 252 F. 553 (2d Cir. 1918), this Court held at page 498, 40 S. Ct. at 409, 64 L. Ed. at 684:

> ". . . we accept the concurrent judgment of the lower courts that the carrier was not negligent in failing to give warning concerning the use of cars with handholds only at two diagonal corners. Whether this constituted negligence depended upon an appreciation of the peculiar facts presented, and the rule is well settled that in such circumstances where two courts have agreed we will not enter upon a minute analysis of the evidence. *Chicago Junction Ry. Co.* v. *King*, 222 U.S. 222."

Then in *Magnum Co.* v. *Coty*, 262 U.S. 159, 43 S. Ct. 531, 67 L. Ed. 922 (1923), this Court stated at page 163, 43 S. Ct. at 532, 67 L. Ed. at 924:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeal was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these limitations upon our issue of the writ."

These Respondents respectfully submit that the primary purpose for which Petitioners seek a writ of certiorari in

this matter is to obtain another opportunity to argue the facts and the law as they relate to Mr. Bibler's contributory negligence. This Court has already indicated by the above cited cases that the writ of certiorari is not available for that purpose. Therefore, Petitioners' petition should be denied.

CONCLUSION

These Respondents respectfully submit that the decision of the Sixth Circuit Court of Appeals does not conflict with any decision of any other Court of Appeals on any point of law, that said Court's interpretation of Title 14 C.F.R., Section 91.87, is correct and does not create any problems for safe operation of air travel and that a writ of certiorari is not to be granted for the purpose of giving the defeated party another hearing.

Wherefore, these Respondents pray that the petition for a writ of certiorari to the Sixth Circuit Court of Appeals be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-17

ANN E. BIBLER, ADMINISTRATRIX OF THE ESTATE OF RALPH BIBLER, DECEASED, ET AL., PETITIONERS

v.

BERRY H. YOUNG, JR., ET AL.,

AND

THE UNITED STATES OF AMERICA AND THE FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

This tort suit arose out of a mid-air collision between two aircraft, designed as 39 Juliet and 18 November, in April 1968, at Port Columbus Airport, Columbus, Ohio, which resulted in the death of Ralph Bibler, the pilot of 39 Juliet.

At the time of the accident, 39 Juliet was completing a second practice approach to runway 28 left as part of

the instruction in instrument landing techniques[1] that Bibler was providing to a student pilot (Pet. App. 23). At all relevant times, including the moment of impact, the radio in 39 Juliet was tuned to the frequency used by Approach Control,[2] and not to the frequency utilized by Local Control, even though three minutes before the collision 39 Juliet passed from Approach Control's jurisdiction into the jurisdiction of Local Control. Bibler also did not tell Local Control that he had passed into its jurisdiction (Pet. App. 28).[3]

Respondent Young, the pilot of 18 November, had been flying under visual flight regulations which were in effect at the time (Pet. App. 23). Accordingly, he was not required to, and did not communicate with Approach Control (Pet. App. 22, 28). Young did receive clearance from Local Control, however, to land on runway 28 left. As Young turned left to land, the configuration of his aircraft was such that he could not see 39 Juliet, which 18 November overtook from above, and the two planes collided (Pet. App. 18, 31).

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[1]The instruction technique included the student's use of a "hood" —a vision limiting device which focuses the attention of the student upon the instruments in the aircraft. Bibler's vision was unobstructed (Pet. App. 23).

[2]The Federal Aviation Administration, which is responsible for the control of air traffic in and around Port Columbus, has divided its function into (1) Local Control, which controls traffic within a five-mile radius from the control tower, and (2) Approach Control, which controls traffic outside this radius. Local Control and Approach Control transmit and receive on separate radio frequencies (Pet. App. 21-22).

[3]On the first practice approach, 39 Juliet had properly contacted Local Control when it passed into its jurisdiction (Pet. App. 24).

Petitioner Ann Bibler, as the administratrix of her husband's estate, sued the United States under the Federal Tort Claims Act and the pilot, owner and operator of 18 November (Young, Ohio Aviation Company and Aviation Distributors, Inc.) to recover for the wrongful death of her husband. The United States cross-claimed for indemnity against the other co-defendants. The case was consolidated for trial with a second action filed by the decedent's employer against the United States for the value of 39 Juliet. In this second action, the United States filed a third party complaint against the other co-defendants, and Ohio Aviation, the owner of 18 November, counter-claimed for damages to its plane (Pet. App. 3).

The district court found that Bibler's failure to contact Local Control after passing into its jurisdiction was negligence and a proximate cause of the accident, and that Young was not negligent (Pet. App. 34). The court held that under the applicable law of Ohio, Bibler's contributory negligence was a complete bar to any recovery by plaintiffs, even though "it may be asserted that [the Approach Controller] was also negligent in failing to instruct 39 Juliet to contact the Tower * * *" (Pet. App. 30).[4] The court also rendered judgment against Bibler's estate in the amount of $17,000 for damages to 18 November (Pet. App. 18). The court of appeals affirmed, stating that the trial judge's findings were "support[ed] by the great weight of the evidence in this record" (Pet. App. 14). Further review by this Court of the factual findings below is not warranted.

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[4]Since Local Control was not advised of Bibler's presence by either Bibler or Approach Control, the court found that Local Control was not negligent (Pet. App. 30, 31). Since Bibler's negligence continued to the point of impact, the court also concluded that the doctrine of last clear chance was inapplicable (Pet. App. 31, 32).

There is no substance in petitioners' contention (Pet. 5-8) that the court of appeals' decision here conflicts with decisions of other circuits "as to the standard of care required of Government air traffic controllers." The district court apparently found that the Approach Controller was negligent in failing to advise the Local Controller that 39 Juliet had passed into its jurisdiction (Pet. App. 30-31) and the court of appeals did not disagree with this finding (Pet. App. 3, 18). Bibler's own failure to contact Local Control, however, deprived it of the knowledge required to warn and separate the converging planes. Bibler's contributory negligence was thus a proximate cause of the accident (Pet. App. 30,31). Since the decisions below were based upon Bibler's contributory negligence, and not upon the standard of care required of government air traffic controllers, the "conflict of decisions" asserted by petitioners is illusory.

Similarly baseless is petitioners' claim (Pet. 8 11) that the courts' construction of 14 C.F.R. 91.87(b), requiring pilots to maintain communications with "the control tower" (Pet. App. 1), raises "significant problems important to the safe operation of air travel." The courts held that Bibler failed to comply with this regulation when he did not communicate with Local Control on passing into its jurisdiction. This construction, which is entirely correct,[5] does not absolve air traffic controllers of any responsibilities, but simply imposes upon pilots the responsibility to communicate with Local Control when their aircraft

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[5]Petitioners' claim that the term "control tower" in Section 91.87 (b) includes "Approach Control" is based upon a semantical confusion with use of the term in other contexts, and, as the court of appeals noted, entirely ignores the purpose of the regulation (Pet. App. 14-15).

pass into the latter's jurisdiction (Pet. App. 15-18, 34). Moreover, the court of appeals noted that, aside from the regulation, the weight of expert testimony at the trial established that the reasonably prudent pilot in Bibler's circumstances would have notified Local Control of his location (Pet. App. 15-17).

Finally, as to the negligence of Young in failing to yield the right of way to Bibler (Pet. 12-14), the United States took no position in the courts below and does not take a position here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied with respect to the federal respondents.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.